70 Am. Jur. 2d Sedition, Etc. Summary

American Jurisprudence, Second Edition | May 2021 Update

Sedition, Subversive Activities, and Treason
Jeffrey J. Shampo, J.D.

Correlation Table

Summary

Scope:
This article discusses crimes against the sovereignty of the nation and the states, offenses stemming from the advocacy of the overthrow of constitutional governments, and threats to the internal security of the United States. It deals with the crimes of treason, sedition, espionage, sabotage, criminal syndicalism, and criminal anarchy.

Federal Aspects:
This article discusses federal statutes dealing with sedition; subversive activities, generally, including activities affecting the armed forces and federal powers under the Smith Act; espionage, including federal powers under the Espionage Act; sabotage; and treason. This article also discusses the validity and construction of the various federal statutes dealing with sedition, subversive activities, espionage, sabotage, and treason, as well as the elements of the offenses created under these various federal statutes, proof and defenses, and procedure under said statutes.

Treated Elsewhere:
Antisubversive oaths required of public officers, see Am. Jur. 2d, Public Officers and Employees § 124

Crime of trading with the enemy, see Am. Jur. 2d, War §§ 58 to 71

Denial of citizenship to persons opposed to, or belonging to organizations opposed to, government or law, see Am. Jur. 2d, Aliens and Citizens §§ 2382 to 2389

Deportation of subversive aliens, see Am. Jur. 2d, Aliens and Citizens §§ 1543, 1579 to 1582

Disloyalty to government as cause for discharge of juror, see Am. Jur. 2d, Jury § 152

Effects of subversive activities, sedition, or treason on Social Security benefits, see Am. Jur. 2d, Social Security and Medicare §§ 1564 to 1568

Enemy aliens, generally, see Am. Jur. 2d, Aliens and Citizens §§ 2143 to 2147

Law of war, see Am. Jur. 2d, War §§ 1 et seq.

Laws making it an offense to interfere with the administration of the Selective Service Act, obstruct recruiting or enlistment in the Armed Forces, or entice persons to desert therefrom, see Am. Jur. 2d, Military and Civil Defense §§ 136, 140

Offenses of: insurrection and rebellion, see Am. Jur. 2d, Insurrection §§ 1 et seq.; rioting, see Am. Jur. 2d, Mobs and Riots §§ 1 et seq.; secession, see Am. Jur. 2d, States, Territories, and Dependencies §§ 1 et seq.

Questions whether acts regulating subversive organizations and prohibiting certain acts by members thereof constitute a bill of attainder, see Am. Jur. 2d, Constitutional Law § 722; whether it is libelous to charge one with sedition, treason, disloyalty, subversion, or with being a terrorist or Communist, see Am. Jur. 2d, Libel and Slander §§ 182, 195, 196

Right of a governor to pardon persons convicted of treason, see Am. Jur. 2d, Pardon and Parole § 30

Showing of disrespect or contempt for the American flag, see Am. Jur. 2d, Flag §§ 1 et seq.

Threats to the life of the President of the United States, see Am. Jur. 2d, Extortion, Blackmail, and Threats § 52

Utterance or advocacy of seditious, subversive, or treasonous principles as protected "free speech" under the Constitution, see Am. Jur. 2d, Constitutional Law § 526

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I. Loyalty Oaths

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 1
West's Key Number Digest, Treason 2

A.L.R. Library

A.L.R. Index, Constitutional Law
A.L.R. Index, Freedom of Speech and Press
A.L.R. Index, Sedition, Subversive Activities, and Treason
West's A.L.R. Digest, Insurrection and Sedition 1
West's A.L.R. Digest, Treason 2

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I. Loyalty Oaths

§ 1. Requirement of loyalty oath, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 1
West's Key Number Digest, Treason 2

A.L.R. Library

Validity of governmental requirement of oath of allegiance or loyalty, 18 A.L.R.2d 268

Forms

Forms relating to oaths of public officers, see Am. Jur. Legal Forms 2d, Public Officers [Westlaw®(r) Search Query]

Under both federal and state statutes, individuals may, in a variety of situations, be obligated to take a loyalty oath affirming that they are not engaged in, or do not advocate sedition, subversive activities, or treason.[1] In assessing the constitutionality of such statutes, the United States Supreme Court has adopted a knowing-conduct standard, taking the view that deprivation of employment or other penalty for innocent association would be a denial of due process.[2] Later cases have suggested that a requirement of knowledge on the part of the affiant as to the subversive nature of an organization to which the affiant belongs may not be sufficient to meet due-process requirements but that, in addition, a loyalty program must provide for consideration of the affiant's intent or lack of intent to further the organization's subversive aims.[3]

A state statute requiring a loyalty oath to both the state and federal government is not an improper interference with federal power to regulate sedition and subversive activities.[4]

Footnotes

1 § 2.

2 Wieman v. Updegraff, 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 216 (1952).
A loyalty oath requiring a statement that the affiant is not engaged "in one way or another" in an attempt to overthrow the government by force or violence does not enable the affiant to know, unless he or she risks a prosecution for perjury, whether a member of a group that is out to overthrow the government by force or violence is engaged in that attempt "in one way or another" even though the affiant is ignorant of the real aims of the group and wholly innocent of any illicit purpose. Whitehill v. Elkins, 389 U.S. 54, 88 S. Ct. 184, 19 L. Ed. 2d 228 (1967).

3 Keyishian v. Board of Regents of University of State of N. Y., 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967); Elfbrandt v. Russell, 384 U.S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321 (1966).

4 State v. Diez, 97 So. 2d 105 (Fla. 1957).
As to whether federal legislation preempts state regulation of seditious activities, see § 81.

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I. Loyalty Oaths

§ 2. Particular applications

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 1
West's Key Number Digest, Treason 2

Loyalty oaths are frequently required of public officers and employees[1] and especially of teachers and others employed by public schools[2] and public institutions of higher learning.[3] A loyalty oath may also be required of one seeking admission to the bar.[4]

While a state may constitutionally require an oath to support the Constitutions of the United States and the state from its legislators, which it does not require of private citizens, it is not constitutionally justified in exacting a higher standard of loyalty from its legislators than from other citizens.[5] A statute requiring all state officers and legislators and candidates for such offices to take an oath that they do not believe in the overthrow of the government by unlawful means and do not belong to any organization which advocates such overthrow is unconstitutional.[6]

A state may enact a loyalty oath requiring public employees to swear or affirm not only to "uphold and defend" the federal and state constitutions but also to "oppose the overthrow" of the federal or state governments by force, violence, or any illegal or unconstitutional method.[7] Such an oath does not impose an obligation of specific, positive action on the oath taker but requires only a commitment to live by constitutional processes of government.[8] No constitutional right is infringed by an oath to abide by the constitutional system in the future since there is no constitutionally protected right to overthrow a government by force, violence, or illegal or unconstitutional means.[9]

A loyalty oath required of a teacher in a private institution has been held unconstitutional on grounds of vagueness where, in addition to an oath to support the state and federal constitutions, it required an oath to faithfully discharge the duties of the position for which the affiant was hired according to the best of his or her ability.[10]

Requiring persons seeking a tax exemption to file oaths that they had not engaged in advocating subversive activities has been held unconstitutional as a denial of due process in that such a requirement imposed on the taxpayer the burden of establishing his or her innocence of the proscribed advocacy.[11]

Footnotes

1 Cole v. Richardson, 405 U.S. 676, 92 S. Ct. 1332, 31 L. Ed. 2d 593 (1972).
As to loyalty oaths required of public officers and employees, generally, see Am. Jur. 2d, Public Officers and Employees[Westlaw®(r): Search Query].

2 Knight v. Board of Regents of University of State of N. Y., 269 F. Supp. 339 (S.D. N.Y. 1967), judgment aff'd, 390 U.S. 36, 88 S. Ct. 816, 19 L. Ed. 2d 812 (1968).
As to loyalty oaths required of teachers and others employed by public schools, generally, see Am. Jur. 2d, Schools[Westlaw®(r): Search Query].

3 Keyishian v. Board of Regents of University of State of N. Y., 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967).

4 Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 91 S. Ct. 720, 27 L. Ed. 2d 749 (1971).
As to loyalty oaths required of person seeking admission to the bar, see Am. Jur. 2d, Attorneys at Law[Westlaw®(r): Search Query].

5 Bond v. Floyd, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966).

6 Imbrie v. Marsh, 3 N.J. 578, 71 A.2d 352, 18 A.L.R.2d 241 (1950).
The First and Fourteenth Amendments are violated by a state statute which provides that no political party or its candidates shall be placed on the ballot for any election until it has filed an affidavit by its officers, under oath, that it does not advocate the overthrow of local, state, or national government by force or violence. Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 94 S. Ct. 656, 38 L. Ed. 2d 635 (1974).

7 Cole v. Richardson, 405 U.S. 676, 92 S. Ct. 1332, 31 L. Ed. 2d 593 (1972).

8 Cole v. Richardson, 405 U.S. 676, 92 S. Ct. 1332, 31 L. Ed. 2d 593 (1972).

9 Cole v. Richardson, 405 U.S. 676, 92 S. Ct. 1332, 31 L. Ed. 2d 593 (1972).

10 Pedlosky v. Massachusetts Institute of Technology, 352 Mass. 127, 224 N.E.2d 414 (1967).

11 First Unitarian Church of Los Angeles v. County of Los Angeles, 357 U.S. 545, 78 S. Ct. 1350, 2 L. Ed. 2d 1484 (1958) (church tax exemption); Speiser v. Randall, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958) (veteran's tax exemption).

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II. Federal Offenses

A. Sedition and Related Offenses

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 1, 2

A.L.R. Library

A.L.R. Index, Constitutional Law
A.L.R. Index, Criminal Law
A.L.R. Index, Espionage
A.L.R. Index, Freedom of Speech and Press
A.L.R. Index, Sedition, Subversive Activities, and Treason
West's A.L.R. Digest, Insurrection and Sedition 1, 2

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II. Federal Offenses

A. Sedition and Related Offenses

1. Offenses, in General

§ 3. Sedition, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 2

Definition:

"Sedition" is defined as an agreement, communication, or other preliminary activity aimed at inciting treason or some lesser commotion against public authority.[1] It is advocacy aimed at inciting or producing—and likely to incite or produce—imminent lawless action.[2] The difference between sedition and treason is that the former is committed by preliminary steps while the latter entails some overt act for carrying out the plan.[3]

As condemned by various statutes, sedition consists of the willful and knowing utterance, writing, or publication of—

— disloyal, scurrilous, or abusive matter against the United States or a state, or the flag, military forces, or uniform of the nation, which matter is designed and calculated to bring them into contempt.[4]

— matter which advocates, incites, fosters, or encourages antagonism, opposition, and hostility to organized government.[5]

— matter which obstructs or interferes with the national recruiting or enlistment services.[6]

Observation:

The nation's first Sedition Act, enacted in 1798,[7] made it a crime, punishable by a $5,000 fine and five years in prison, "if any person shall write, print, utter or publish … any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress … or the President … with intent to defame … or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." The Act allowed the defendant the defense of truth and provided that the jury were to be judges both of the law and the facts.[8] Despite these qualifications, the Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison.[9] The invalidity of the Act was widely assumed.[10]

On the subject of seditious libel, the modern tendency is toward a great relaxation of the strict rules which once prevailed, and there is substantial support for the view that an absolute privilege attaches to criticism of government and governmental systems.[11] Similarly, the constitutional guarantee of free speech and press forbids criminal sanctions for truthful criticisms of public officials and also protects false criticism in the absence of malice or recklessness.[12]

Footnotes

1 Black's Law Dictionary (10th ed.).

2 Black's Law Dictionary (10th ed.).

3 Black's Law Dictionary (10th ed.).

4 State v. Sinchuk, 96 Conn. 605, 115 A. 33, 20 A.L.R. 1515 (1921).

5 State v. Sinchuk, 96 Conn. 605, 115 A. 33, 20 A.L.R. 1515 (1921).

6 Gilbert v. State of Minn., 254 U.S. 325, 41 S. Ct. 125, 65 L. Ed. 287 (1920); State v. Holm, 139 Minn. 267, 166 N.W. 181 (1918).

7 1 Stat. 596 (repealed).

8 New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964).

9 New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964).

10 New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964).

11 City of Chicago v. Tribune Co., 307 Ill. 595, 139 N.E. 86, 28 A.L.R. 1368 (1923).

12 Garrison v. State of La., 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964).
As to comment and criticism of public officials, see Am. Jur. 2d, Libel and Slander[Westlaw®(r): Search Query].

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II. Federal Offenses

A. Sedition and Related Offenses

1. Offenses, in General

§ 4. Seditious conspiracy

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 2

Trial Strategy

Handling the Defense in a Conspiracy Prosecution, 20 Am. Jur. Trials 351

It is a crime for two or more persons within the jurisdiction of the United States:[1]

• to conspire to overthrow or destroy by force the government of the United States or to levy war against them

• to oppose by force the authority of the United States government; to prevent, hinder, or delay by force the execution of any law of the United States

• to take, seize, or possess by force any property of the United States contrary to the authority thereof

To be convicted of seditious conspiracy, one must conspire to use force, not just advocate the use of force,[2] and the government must demonstrate that:[3]

(1) in a state, or territory, or place subject to the jurisdiction of the United States;

(2) two or more persons conspired to levy war against or oppose by force the authority of the United States government; and

(3) that the defendant was a member of the conspiracy.

The protections of the Treason Clause of the United States Constitution[4] do not apply to prosecutions for seditious conspiracy as seditious conspiracy differs from treason in punishment and in its essential elements.[5] For example, seditious conspiracy does not require an overt act as does the crime of treason,[6] and owing allegiance to the United States is not an element of seditious conspiracy.[7]

The seditious-conspiracy statute does not on its face violate the First Amendment, inasmuch as it proscribes "speech" only when it constitutes an agreement to use force against the United States.[8] Nor is the seditious-conspiracy statute overbroad in violation of the First Amendment as it is drawn sufficiently narrowly that there is no unacceptable risk that it will deter the expression of unpopular viewpoints by persons ideologically opposed to the government.[9] The portions of the seditious-conspiracy statute prohibiting a conspiracy to levy war against the United States and to oppose the authority of the United States by force are also not void under the First Amendment for vagueness.[10]

Observation:

The seditious conspiracy statute has been used to prosecute a political party or group which attempted the assassination of public figures in order to achieve Puerto Rican independence.[11]

The punishment provided for seditious conspiracy is imprisonment or a fine, or both.[12]

Footnotes

1 18 U.S.C.A. § 2384.
As to levying war against the United States as an element of the crime of treason, see § 66.

2 U.S. v. Rahman, 189 F.3d 88, 52 Fed. R. Evid. Serv. 425 (2d Cir. 1999).

3 U.S. v. Rahman, 189 F.3d 88, 52 Fed. R. Evid. Serv. 425 (2d Cir. 1999).

4 U.S. Const. Art. III, § 3.

5 U.S. v. Rahman, 189 F.3d 88, 52 Fed. R. Evid. Serv. 425 (2d Cir. 1999).

6 Bryant v. U.S., 257 F. 378 (C.C.A. 5th Cir. 1919).

7 U.S. v. Rahman, 189 F.3d 88, 52 Fed. R. Evid. Serv. 425 (2d Cir. 1999).

8 U.S. v. Rahman, 189 F.3d 88, 52 Fed. R. Evid. Serv. 425 (2d Cir. 1999).

9 U.S. v. Rahman, 189 F.3d 88, 52 Fed. R. Evid. Serv. 425 (2d Cir. 1999).

10 U.S. v. Rahman, 189 F.3d 88, 52 Fed. R. Evid. Serv. 425 (2d Cir. 1999).

11 United States v. Lebron, 222 F.2d 531 (2d Cir. 1955).

12 18 U.S.C.A. § 2384.

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II. Federal Offenses

A. Sedition and Related Offenses

1. Offenses, in General

§ 5. Seditious conspiracy—Procedural aspects and proof

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 2

Treatises and Practice Aids

Federal Procedure, L. Ed., Armed Forces, Civil Disturbances, and National Defense[Westlaw®(r): Search Query]

Trial Strategy

Handling the Defense in a Conspiracy Prosecution, 20 Am. Jur. Trials 351

An indictment charging seditious conspiracy must allege that the purpose of the conspiracy was the exertion of force against those charged with the duty of executing the laws of the United States or the language must be such that an inference reasonably follows that this was the purpose and object of the conspiracy.[1]

Seditious conspirators are triable together where there is a single conspiracy although they may have perpetrated different acts in furtherance of the conspiracy and the acts may have taken place over a period of years.[2]

When a seditious conspiracy is shown, the act of one conspirator in furtherance of a common purpose is admissible evidence against all[3] even though the conspirator committing the act is not being tried.[4]

Footnotes

1 Anderson v. U.S., 273 F. 20 (C.C.A. 8th Cir. 1921).

2 United States v. Lebron, 222 F.2d 531 (2d Cir. 1955).

3 United States v. Lebron, 222 F.2d 531 (2d Cir. 1955).

4 Isenhouer v. U.S., 256 F. 842 (C.C.A. 8th Cir. 1919).

70 Am. Jur. 2d Sedition, Etc. § 6

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II. Federal Offenses

A. Sedition and Related Offenses

1. Offenses, in General

§ 6. Correspondence with foreign governments

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 2

A federal statute known as the "Logan Act" makes it a crime for any citizen of the United States to commence or carry on, directly or indirectly, any correspondence or intercourse with any foreign government or officer or agent thereof with intent to influence measures or conduct of any foreign government or any officer or agent thereof in relation to disputes or controversies with the United States or to defeat measures of the United States.[1] Congress has the power to enact such legislation since it falls within the purview of the federal government's extensive power over foreign relations.[2]

Caution:

The Logan Act has been criticized as being too vague and indefinite in its terminology.[3] Indeed, the constitutionality of the statute is doubtful under the Sixth Amendment provision that the accused shall be informed of the nature and cause of the accusation since the words "defeat" and "measures" (as used in the statutory phrase "to defeat the measures of the United States") are not abstractions of common certainty and do not possess a definite statutory or judicial definition.[4] Any ambiguity in the Logan Act should be resolved in favor of leniency.[5]

The punishment provided for criminal correspondence with foreign governments is imprisonment or a fine, or both.[6]

Observation:

A charge that a soldier, during a previous service period, had violated the Logan Act is triable by the civil courts, and a court-martial is without jurisdiction even though the soldier had reenlisted.[7]

Footnotes

1 18 U.S.C.A. § 953.

2 U.S. v. Peace Information Center, 97 F. Supp. 255 (D. D.C. 1951).

3 Waldron v. British Petroleum Co., 231 F. Supp. 72, 8 Fed. R. Serv. 2d 56F.1, Case 1 (S.D. N.Y. 1964).

4 Waldron v. British Petroleum Co., 231 F. Supp. 72, 8 Fed. R. Serv. 2d 56F.1, Case 1 (S.D. N.Y. 1964).

5 Waldron v. British Petroleum Co., 231 F. Supp. 72, 8 Fed. R. Serv. 2d 56F.1, Case 1 (S.D. N.Y. 1964).

6 18 U.S.C.A. § 953.

7 Martin v. Young, 134 F. Supp. 204 (N.D. Cal. 1955).

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II. Federal Offenses

A. Sedition and Related Offenses

1. Offenses, in General

§ 7. Recruiting or enlisting to serve against United States

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 2

Under the federal statutes, it is an offense to recruit soldiers or sailors within the United States, or in any place subject to the jurisdiction thereof, to engage in armed hostility against the United States, or to open within the United States, or in any place subject to the jurisdiction thereof, a recruiting station for the enlistment of such soldiers or sailors to serve in any manner in armed hostility against the United States.[1] The punishment for recruiting for service against the United States is imprisonment or a fine, or both.[2]

The federal statutes also make every person enlisted or engaged within the United States, or in any place subject to the jurisdiction thereof, with intent to serve in armed hostility against the United States, subject to a fine or imprisonment, or both.[3] A defendant's agreement, in a meeting with coconspirators in the United States, to plan a trip to Pakistan in order to be trained there to fight in Afghanistan against United States forces, constituted a violation of the statute.[4] The essential elements of the crime of enlistment to serve against the United States are:[5]

(1) enlistment or engagement within the United Sates or any place subject to the jurisdiction thereof,

(2) with intent to serve in armed hostility against the United States.

Footnotes

1 18 U.S.C.A. § 2389.

2 18 U.S.C.A. § 2389.

3 18 U.S.C.A. § 2390.

4 U.S. v. Khan, 309 F. Supp. 2d 789, 7 A.L.R. Fed. 2d 625 (E.D. Va. 2004), aff'd in part, remanded in part on other grounds, 461 F.3d 477 (4th Cir. 2006), as amended, (Sept. 7, 2006).

5 U.S. v. Khan, 309 F. Supp. 2d 789, 7 A.L.R. Fed. 2d 625 (E.D. Va. 2004), aff'd in part, remanded in part on other grounds, 461 F.3d 477 (4th Cir. 2006), as amended, (Sept. 7, 2006).

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II. Federal Offenses

A. Sedition and Related Offenses

2. Activities Affecting the Armed Forces

§ 8. Statutory provisions, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 2

Trial Strategy

Handling the Defense in a conspiracy Prosecution, 20 Am. Jur. Trials 351

Definition:

"Military and naval forces of the United States" includes the Army of the United States, the Navy, Air Force, Marine Corps, Coast Guard, Naval Reserve, Marine Corps Reserve, and Coast Guard Reserve of the United States, and, when any merchant vessel is commissioned in the Navy or is in the service of the Army or the Navy, the terms include the master, officers, and crew of such vessel.[1] Registrants under the Selective Training and Service Act have been held to be in the "military or naval forces" within the meaning of this statute.[2]

A federal statute makes it a crime to, with intent to interfere with, impair or influence the loyalty, morale, or discipline of the military or naval forces of the United States:[3]

(1) advise, counsel, urge, or in any manner cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States; or

(2) distribute or attempt to distribute any written or printed matter which advises, counsels, or urges insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States.

The purpose of the statute is to prevent subversive activities[4] and applies in peacetime as well as under war conditions.[5]

A similar statute applies specifically to wartime conditions and makes it a criminal offense for any person, when the United States is at war to:[6]

(1) willfully to make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, or

(2) willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or the United States, or attempt to do so.

This offense also is punishable as a conspiracy,[7] and it is a crime to knowingly harbor or conceal one who has committed the offense.[8]

A closely related statute under the Uniform Code of Military Justice makes it a court-martial offense for military personnel to engage in disorders or neglects to the prejudice of good order and discipline in the Armed Forces and proscribes conduct of a nature to bring discredit upon the Armed Forces.[9]

Footnotes

1 18 U.S.C.A. § 2387(b).

2 Debs v. U.S., 249 U.S. 211, 39 S. Ct. 252, 63 L. Ed. 566 (1919).

3 18 U.S.C.A. § 2387(a).

4 U.S. v. Gancy, 54 F. Supp. 755 (D. Minn. 1944), judgment aff'd, 149 F.2d 788 (C.C.A. 8th Cir. 1945).

5 Dunne v. U. S., 138 F.2d 137 (C.C.A. 8th Cir. 1943).

6 18 U.S.C.A. § 2388(a).
As to related offenses under the Selective Service Act, including refusal to perform any duty under the Act, and counseling another to evade registration or service in the Armed Forces, see Am. Jur. 2d, Military and Civil Defense[Westlaw®(r): Search Query].

7 18 U.S.C.A. § 2388(b).

8 18 U.S.C.A. § 2388(c).

9 10 U.S.C.A. § 934.

70 Am. Jur. 2d Sedition, Etc. § 9

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II. Federal Offenses

A. Sedition and Related Offenses

2. Activities Affecting the Armed Forces

§ 9. Constitutionality

Topic Summary | Correlation Table | References

West's Key Number Digest

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The federal criminal statute specifically applicable to activities affecting the military and naval forces of the United States in time of war[1] was first enacted as part of the Espionage Act of 1917, and in a series of cases arising out of World War I conditions, its provisions were held constitutional.[2] The statute was held not to infringe the constitutional guaranties of freedom of speech or of the press,[3] particularly in view of the stricter limitations of those freedoms during time of war.[4] The statute was also upheld as valid over the contention that some of the acts and matters prohibited constitute treason and are punishable as such or not at all and that other acts complained of, not being treason, cannot be punished under that Act.[5]

The provision of the Uniform Code of Military Justice,[6] which in effect proscribes the conduct of military personnel who engage in advocating disloyalty among other enlisted personnel, has been upheld against challenges of vagueness and overbreadth in violation of the First Amendment.[7]

Footnotes

1 18 U.S.C.A. § 2388.

2 Pierce v. U.S., 252 U.S. 239, 40 S. Ct. 205, 64 L. Ed. 542 (1920); Debs v. U.S., 249 U.S. 211, 39 S. Ct. 252, 63 L. Ed. 566 (1919); Frohwerk v. U.S., 249 U.S. 204, 39 S. Ct. 249, 63 L. Ed. 561 (1919).

3 U.S. ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407, 41 S. Ct. 352, 65 L. Ed. 704 (1921).

The immunity of the general theme of a public speech, as, for example, socialism, does not exempt the speaker from prosecution under the statute, where the speech was so expressed that its natural and intended effect was to obstruct the military recruiting or enlistment service. Debs v. U.S., 249 U.S. 211, 39 S. Ct. 252, 63 L. Ed. 566 (1919).

4 Schenck v. U.S., 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919).

5 Frohwerk v. U.S., 249 U.S. 204, 39 S. Ct. 249, 63 L. Ed. 561 (1919).

6 10 U.S.C.A. § 934.

7 Secretary of Navy v. Avrech, 418 U.S. 676, 94 S. Ct. 3039, 41 L. Ed. 2d 1033 (1974); Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974).

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§ 10. Construction and application

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Definition:

The word "obstruct" does not mean to prevent in the sense of stopping absolutely but means simply to "make difficult" or to "present obstacles to the accomplishing of a thing."[1]

The courts, in construing and applying the statute providing for the punishment of any person who obstructs or interferes with military recruiting or enlistment,[2] have done so in light of the fact of the existence of the war in which the United States was engaged at the time of its enactment.[3]

The obstruction of recruiting may be accomplished by words of persuasion in newspaper publications as well as by false statements[4] and inflammatory speeches.[5] It applies as well to interference with recruiting or enlisting men by conscription, pursuant to an existing selective service draft statute, as to interference with recruiting or enlisting volunteers.[6] However, one who gives bona fide advice to a person eligible for service in the Armed Forces not to volunteer is not within the condemnation of this statute.[7] This statute is penal in nature and restricts the right to speak and write freely, so it must be construed narrowly and care must be taken to use its words in a strict and accurate sense.[8]

Intent is an element of the offense of willfully attempting to cause insubordination, disloyalty, mutiny, and refusal of duty in the military or naval forces, and of the offense of willfully obstructing the recruiting or enlistment service of the United States.[9] It is not, however, an essential element of this offense that the intended results followed the efforts to cause insubordination, disloyalty, or the like.[10]

The provision making it unlawful willfully to make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies[11] is violated where false statements are made, the natural and intended effect of which is reasonably within the contemplation of the provision.[12] The fact that the statements purport to comment on matters pretended to be facts of common knowledge does not excuse the statements.[13]

Footnotes

1 Coldwell v. U.S., 256 F. 805 (C.C.A. 1st Cir. 1919); O'Hare v. U.S., 253 F. 538 (C.C.A. 8th Cir. 1918).

2 18 U.S.C.A. § 2388, discussed in § 8.

3 Schenck v. U.S., 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919).

4 Frohwerk v. U.S., 249 U.S. 204, 39 S. Ct. 249, 63 L. Ed. 561 (1919).
Publication in the German language, during war with Germany, of derisive and contemptuous articles falsely declaring the unpopularity of the war in this country and impugning the motives and activities of the executive power, was sufficient to sustain a conviction. Schaefer v. U S, 251 U.S. 466, 40 S. Ct. 259, 64 L. Ed. 360 (1920).

5 U.S. v. Krafft, 249 F. 919 (C.C.A. 3d Cir. 1918).

6 Schenck v. U.S., 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919); U.S. v. Krafft, 249 F. 919 (C.C.A. 3d Cir. 1918).

7 U.S. v. Nearing, 252 F. 223 (S.D. N.Y. 1918).

8 Hartzel v. U.S., 322 U.S. 680, 64 S. Ct. 1233, 88 L. Ed. 1534 (1944).

9 U.S. v. Krafft, 249 F. 919 (C.C.A. 3d Cir. 1918).
Other acts of a defendant charged with the commission of acts or the utterance of words in violation of the Espionage Act are generally held to be admissible for the purpose of showing the defendant's intent. Herman v. U.S., 257 F. 601 (C.C.A. 9th Cir. 1919).

10 Schenck v. U.S., 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919); U.S. v. Krafft, 249 F. 919 (C.C.A. 3d Cir. 1918).

11 18 U.S.C.A. § 2388(a), discussed in § 8.

12 Pierce v. U.S., 252 U.S. 239, 40 S. Ct. 205, 64 L. Ed. 542 (1920).

13 Pierce v. U.S., 252 U.S. 239, 40 S. Ct. 205, 64 L. Ed. 542 (1920).

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§ 11. Construction and application—Similar provision in Code of Military Justice

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West's Key Number Digest

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The elements of the offense defined by the Uniform Code of Military Justice[1] proscribing disorders and neglect to the prejudice of good order and discipline in the Armed Forces, and all conduct of a nature to bring discredit upon the Armed Forces, have been held included in charges of violating the federal statute[2] making it a crime to impair or influence the loyalty, morale, or discipline of the military or naval forces of the United States by making disloyal statements.[3] In this sense, the conduct of a member of the Armed Forces in advocating disloyalty to the Armed Forces is the offense.[4] Conduct sufficient to constitute a violation of the statute has included the statements of a commissioned army officer who publicly urged minority enlisted personnel to refuse to obey orders which might send them into combat in Vietnam[5] and the attempt of a serviceman to publish disloyal statements to members of the Armed Forces in order to promote disloyalty and disaffection among the troops.[6]

Footnotes

1 10 U.S.C.A. § 934, discussed in § 8.

2 18 U.S.C.A. § 2387, discussed in § 8.

3 U.S. v. Harvey, 42 C.M.R. 141, 1970 WL 7022 (C.M.A. 1970).

4 Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974).

5 Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974).

6 Secretary of Navy v. Avrech, 418 U.S. 676, 94 S. Ct. 3039, 41 L. Ed. 2d 1033 (1974); U.S. v. Priest, 45 C.M.R. 338, 1972 WL 14190 (C.M.A. 1972).

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2. Activities Affecting the Armed Forces

§ 12. Punishment

Topic Summary | Correlation Table | References

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The prescribed punishment for causing or attempting to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, with the intent to interfere with the military or naval forces of the United States, is imprisonment or a fine, or both, in addition to which the person convicted shall be ineligible for employment by the United States or by any department or agency thereof for five years next following his or her conviction.[1] For interfering with the military or naval forces of the United States in time of war, by conveying false reports or causing or attempting to cause insubordination, disloyalty, mutiny, or refusal of duty, or obstructing recruitment, the punishment is a fine, or imprisonment, or both.[2]

Footnotes

1 18 U.S.C.A. § 2387(a).

2 18 U.S.C.A. § 2388(a).

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70 Am. Jur. 2d Sedition, Etc. § 13

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§ 13. Procedure

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West's Key Number Digest

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The federal statute proscribing certain activities affecting the military or naval forces of the United States during war[1] applies within the admiralty and maritime jurisdiction on the United States, and on the high seas, as well as within the United States.[2]

A prosecution of a member of the military or naval forces of the United States for interfering with, impairing, or influencing the loyalty, morale, or discipline of the military or naval forces of the United States in violation of the federal statute proscribing such conduct[3] is within the jurisdiction of a court-martial if the offense is service-connected.[4] A sufficient service connection is established where alleged wrongful acts are committed on a military base and with the intent of affecting members of the military service.[5] However, a court-martial lacks jurisdiction to try an individual for interference with the Armed Forces where the individual is not charged until after his or her discharge from the Armed Forces even though the offense occurred during a previous term of enlistment and the individual has since reenlisted.[6]

Practice Tip:

Offenses under the general article of the Uniform Code of Military Justice[7] which in effect proscribes the conduct of Armed Forces personnel who engage in advocating disloyalty in a manner similar to the offense defined by federal statute[8] are expressly made subject to the jurisdiction of a court-martial.[9]

Footnotes

1 18 U.S.C.A. § 2388, discussed in § 8.

2 18 U.S.C.A. § 2388(d).

3 18 U.S.C.A. § 2387, discussed in § 8.

4 U.S. v. Daniels, 42 C.M.R. 131, 1970 WL 7021 (C.M.A. 1970).

5 U.S. v. Daniels, 42 C.M.R. 131, 1970 WL 7021 (C.M.A. 1970).

6 Martin v. Young, 134 F. Supp. 204 (N.D. Cal. 1955).

7 10 U.S.C.A. § 934, discussed in § 8.

8 18 U.S.C.A. § 2387.

9 10 U.S.C.A. § 934.

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A.L.R. Library

A.L.R. Index, Constitutional Law
A.L.R. Index, Criminal Law
A.L.R. Index, Espionage
A.L.R. Index, Spies and Spying
West's A.L.R. Digest, War and National Emergency 1125

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B. Espionage

1. In General

§ 14. Power to proscribe espionage; definition

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West's Key Number Digest

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Definition:

One is engaged in "espionage," or "spying," when the person obtains information relating to national defense and communicates it to a foreign nation knowing that it will be used to the advantage of such nation or to the injury of the United States.[1] Espionage refers to the crime of gathering, transmitting, or losing information related to the national defense with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of any foreign nation.[2]

Congress has the power to prescribe criminal penalties for those who engage in espionage.[3] Although the Civil Service Commission conducts investigations for the purposes of determining loyalty, this does not affect the responsibility of the Federal Bureau of Investigation to investigate espionage.[4]

Footnotes

1 Gorin v. U.S., 312 U.S. 19, 61 S. Ct. 429, 85 L. Ed. 488 (1941).

2 U.S. v. Helmich, 521 F. Supp. 1246 (M.D. Fla. 1981), judgment aff'd, 704 F.2d 547 (11th Cir. 1983).

3 U.S. v. Robel, 389 U.S. 258, 88 S. Ct. 419, 19 L. Ed. 2d 508 (1967).

4 5 U.S.C.A. § 1304(g).

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2. Statutory Provisions

§ 15. Federal statutes, generally

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West's Key Number Digest

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The Espionage Act[1] makes it unlawful—

— to enter or obtain information about any place connected with national defense for the purpose of obtaining information respecting national defense with intent or reason to believe that the information is to be used to the injury of the United States or to the advantage of any foreign nation.[2]

— to make or copy, or attempt to make or copy, any sketch, photograph, plan, and the like of anything connected with national defense for such purpose;[3]

— to receive or agree or attempt to receive from any person such materials when the recipient has reason to believe that they were taken in violation of the Espionage Act.[4]

Another provision of the Espionage Act makes it unlawful for one who has lawful possession of certain documents, photographs, models, and similar material to transmit such material to one not authorized to receive it.[5] This section also prohibits the transmittal of information relating to the national defense, which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation.[6] Such transmittal is also unlawful by persons who have unauthorized possession of such material.[7] The Espionage Act further makes it a crime for a person who is entrusted with documents, records, or other materials or information relating to the national defense to permit the loss, theft, or removal of such material or information through gross negligence, or knowingly fail to report such loss or theft.[8]

The Espionage Act also proscribes communicating, delivering, or transmitting to any foreign government, or to a military force within any foreign country, or to any representative or citizen thereof, any information relating to national defense, or attempting to do so, with reason to believe that such information is to be used to the injury of the United States or to the advantage of a foreign nation.[9] In time of war, it is also a crime to inform the enemy of troop movements and military plans or any other information relating to the public defense.[10] The Act also makes it a crime to harbor or conceal any person known or reasonably believed to have committed or be about to commit an offense under these provisions.[11]

Other provisions of the Espionage Act proscribe a variety of related activities, including:

- photographing or representing defense installations without prior permission of and censorship by the commanding officer[12]
- the use of aircraft to accomplish the same proscribed purpose[13]
- the publication and sale of photographs or representations of defense installations without prior permission of and censorship by the commanding officer[14]
- the knowing and willful disclosure of classified information to an unauthorized person, or its use in any manner prejudicial to the United States or beneficial to any foreign government to the detriment of the United States[15]
- the willful violation, attempted violation, or conspiracy to violate regulations of the National Aeronautics and Space Administration pertaining to the security of its facilities or equipment[16]

Footnotes

1 18 U.S.C.A. §§ 792 et seq.

2 18 U.S.C.A. § 793(a).

3 18 U.S.C.A. § 793(b).

4 18 U.S.C.A. § 793(c).

5 18 U.S.C.A. § 793(d).

6 18 U.S.C.A. § 793(d).

7 18 U.S.C.A. § 793(e).

8 18 U.S.C.A. § 793(f).

9 18 U.S.C.A. § 794(a).

10 18 U.S.C.A. § 794(b).

11 18 U.S.C.A. § 792.
As to crime of harboring criminals, generally, see Am. Jur. 2d, Harboring Criminals[Westlaw®(r): Search Query].

12 18 U.S.C.A. § 795.

13 18 U.S.C.A. § 796.

14 18 U.S.C.A. § 797.

15 18 U.S.C.A. § 798.

16 18 U.S.C.A. § 799.
As to the provision of the Subversive Activities Control Act (50 U.S.C.A. § 797(a)) making it unlawful to violate any security regulation of the Defense Department or the National Aeronautics and Space Administration, see § 16.

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70 Am. Jur. 2d Sedition, Etc. § 16

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§ 16. Classified information

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West's Key Number Digest

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A provision of the Subversive Activities Control Act defines two offenses in the nature of espionage, and under these provisions, it is unlawful for any government officer or employee to communicate classified information to a person who is an agent or representative of a foreign government[1] and for an agent or representative of a foreign government to receive such information.[2] This statute proscribes furnishing or receiving classified information between a government employee and an agent of a foreign government.[3]

Another provision of the Act makes it a crime to willfully violate any regulation or order in the nature of a security regulation of the Defense Department or of the National Aeronautics and Space Administration.[4]

Observation:

The Subversive Activities Control Act should be construed as being in addition to and not in modification of existing criminal statutes.[5]

Footnotes

1 50 U.S.C.A. § 783(a).

2 50 U.S.C.A. § 783(b).

3 U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980).

4 50 U.S.C.A. § 797(a).

5 50 U.S.C.A. § 796.

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§ 17. Constitutionality

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West's Key Number Digest

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Forms

Forms relating to classified information, see Am. Jur. Pleading and Practice Forms, War [Westlaw®(r) Search Query]

The constitutionality of the Espionage Act has been upheld against various challenges, and the communication of secret defense material to a foreign nation cannot, by any farfetched reasoning, be included within the area of First Amendment protected speech.[1] The Espionage Act is not unconstitutional on the ground that it punishes treasonable acts without providing for the constitutional safeguards peculiar to prosecutions for treason as the offenses described in 18 U.S.C.A. §§ 793, 794 are distinct from the crime of treason as defined in the United States Constitution.[2] However, it has been recognized that espionage is a form of treason.[3]

Footnotes

1 United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952).
As to the validity of the death penalty provisions under the Espionage Act, see § 22.

2 U.S. v. Drummond, 354 F.2d 132 (2d Cir. 1965); United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952).

3 A defendant's prosecution for unlawfully disclosing national defense information to a person not entitled to receive it does not violate the Treason Clause. U.S. v. Kim, 808 F. Supp. 2d 44 (D.D.C. 2011).
U.S. v. Helmich, 521 F. Supp. 1246 (M.D. Fla. 1981), judgment aff'd, 704 F.2d 547 (11th Cir. 1983).
As to treason, generally, see §§ 59 to 79.

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70 Am. Jur. 2d Sedition, Etc. § 18

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§ 18. Constitutionality—Vagueness and overbreadth

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, War and National Emergency 1125

A construction of the Espionage Act to proscribe obtaining and divulging information related to and connected with the national defense does not render it unconstitutionally indefinite and violative of due process.[1] The espionage statutes dealing with the communication or transmission of national defense information have survived constitutional challenges on grounds of vagueness and overbreadth.[2] In particular, the phrases "information relating to the national defense" and "entitled to receive" are not unconstitutionally vague.[3] Further, the terms "relating to the national defense" have a well-understood connotation and were carried forth from the predecessor statute, without change, which statute also passed constitutional muster.[4] Even assuming the merits of the challenge, the problem of overbreadth can be cured by a limiting instruction to the jury specifying what the prosecution must show in order to establish the relationship of the documents or information in question to the national defense.[5]

The scienter element of the offense of espionage, requiring a specific intent or reason to believe that the defendant's actions in the transmission of the national defense-related information will injure the United States or aid a foreign nation, serves to render the statute constitutionally sound against charges of overbreadth.[6] The absence of a specific scienter requirement, however, does not render other provisions of the espionage statute unconstitutionally vague, since the statute does require knowledge of the document's illegal abstraction or removal from its proper place of custody, from which knowledge of injury to the United States could certainly be inferred.[7] The term "willfully" as used in the "documents clause" of the Espionage Act[8] prohibiting maintaining unauthorized possession of certain documents and willfully retaining them was not unconstitutionally vague.[9]

Observation:

A defendant charged with violating the "documents" clause of the Espionage Act, for willfully removing and retaining documents relating to national defense, has no standing to challenge the alleged unconstitutional vagueness of the separate "information" provision, which criminalizes the willful communication of intangible information relating to national defense.[10]

Footnotes

1 Gorin v. U.S., 312 U.S. 19, 61 S. Ct. 429, 85 L. Ed. 488 (1941).

2 U.S. v. Boyce, 594 F.2d 1246 (9th Cir. 1979) (construing 18 U.S.C.A. §§ 793, 794); U.S. v. Kim, 808 F. Supp. 2d 44 (D.D.C. 2011) (18 U.S.C.A. § 793(d) not vague).

3 U.S. v. Rosen, 445 F. Supp. 2d 602 (E.D. Va. 2006), opinion amended on other grounds, 2006 WL 5049154 (E.D. Va. 2006) and aff'd, 557 F.3d 192 (4th Cir. 2009) (as used in Espionage Act provisions prohibiting transmission of and conspiracy to transmit information relating to national defense to those not entitled to receive it).

4 U.S. v. Dedeyan, 584 F.2d 36 (4th Cir. 1978).

5 U.S. v. Dedeyan, 584 F.2d 36 (4th Cir. 1978).

6 U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980).

7 U.S. v. Dedeyan, 584 F.2d 36 (4th Cir. 1978).

8 18 U.S.C.A. § 793(e).

9 United States v. Hitselberger, 991 F. Supp. 2d 101 (D.D.C. 2013); U.S. v. Drake, 818 F. Supp. 2d 909 (D. Md. 2011).

10 United States v. Hitselberger, 991 F. Supp. 2d 101 (D.D.C. 2013).

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§ 19. Construction and application

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Congress has the power to break down into separate offenses the various aspects of espionage activity and to make each separate aspect punishable.[1] Thus, conviction under a provision making it a crime to obtain defense information,[2] and under a provision making it a crime to transmit defense information,[3] does not constitute double jeopardy since each section requires proof of an additional fact and constitutes a distinct statutory offense.[4]

The offense of a government employee under the Subversive Activities Control Act, knowingly communicating classified information to the agent of a foreign government, or knowingly receiving same,[5] is equally applicable to persons with civilian status where they act to encourage and facilitate the communication or receipt of classified information by or from a government employee.[6] Nor is the provision of the Espionage Act which requires a report to a "superior officer," regarding the abstraction of a national defense document,[7] restricted to military personnel or government employees, since the statute, by its terms, applies to whoever is entrusted with or has lawful possession or control of the document or information.[8] Considered in conjunction with the structure and purposes of the Espionage Act as a whole and with other sections of the Act in pari materia with it, the statute prohibiting those with access to national defense information from willfully communicating, delivering, or transmitting the information to a person not entitled to receive it[9] was not intended to apply narrowly to "spying" but was intended to apply to the disclosure of secret defense material to anyone "not entitled to receive it."[10]

Observation:

Even where the government has attempted to restrict dissemination, as by declaring certain documents to be secret, the Espionage Act apparently does not bar publication by newspapers, as distinguished from communication to persons not entitled to receive it, of information which may be harmful to the United States.[11]

Footnotes

1 Boeckenhaupt v. U.S., 392 F.2d 24 (4th Cir. 1968).

2 18 U.S.C.A. § 793(b), discussed at § 15.

3 18 U.S.C.A. § 794(a), discussed at § 15.

4 US v. Coplon, 88 F. Supp. 910 (S.D. N.Y. 1949).

5 50 U.S.C.A. § 783(a), (b), discussed at § 16.

6 U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980).

7 18 U.S.C.A. § 793(f), discussed at § 15.

8 U.S. v. Dedeyan, 584 F.2d 36 (4th Cir. 1978).

9 18 U.S.C.A. § 793(d).

10 U.S. v. Morison, 844 F.2d 1057, 25 Fed. R. Evid. Serv. 647 (4th Cir. 1988) (rejected on other grounds by, U.S. v. McAusland, 979 F.2d 970 (4th Cir. 1992)).

11 New York Times Co. v. U.S., 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971).

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§ 20. Attempts

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West's Key Number Digest

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Under the provisions of the Espionage Act,[1] one who attempts to obtain or transmit defense information is punishable to the same extent as one who actually obtains or transmits such information.[2] Further, in accordance with the general rules governing attempts to commit a crime, an employee of the federal government who carried defense information to a rendezvous with a foreign agent, but who was arrested before she was able to hand over the information, was guilty of an attempt to deliver defense information in violation of the espionage laws rather than of a mere preparation to commit the offense.[3]

Footnotes

1 18 U.S.C.A. §§ 793, 794.

2 § 15.

3 United States v. Coplon, 185 F.2d 629, 28 A.L.R.2d 1041 (2d Cir. 1950).
As to attempt to commit crimes, generally, see Am. Jur. 2d, Criminal Law[Westlaw®(r): Search Query].

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70 Am. Jur. 2d Sedition, Etc. § 21

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§ 21. Conspiracy

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, War and National Emergency 1125

Trial Strategy

Handling the Defense in a Conspiracy Prosecution, 20 Am. Jur. Trials 351

The essence of the crime of conspiracy under the Espionage Act is the joining together of two or more people in an agreement, with the intent and purpose of committing some violation of the espionage laws in the future.[1] A conspiracy in violation of the Act is not immune from punishment criminally because the conspirators fail to agree in advance upon the precise method by which the law shall be violated.[2] The fact that one accused of conspiring to violate the espionage laws and the coconspirators never succeeded in gathering or transmitting any unlawful information does not in any way lessen the criminality of their activities as the defendant is guilty if he or she knew of the unlawful purpose of the conspiracy even if the conspirators did not succeed in their mission.[3]

While an overt act is essential to make a conspiracy to violate the Act punishable as a criminal offense, such overt act need not be a criminal act in and of itself and still less need it constitute the very crime which is the object of the conspiracy.[4] The prosecution may rely on conduct by the defendant, lawful in and of itself, to establish an overt act in furtherance of the unlawful conspiracy, such as the defendant's steps to collect money owed after the transmittal of secrets.[5]

Practice Tip:

Charges of conspiracy to commit espionage are frequently coupled with direct espionage charges as included offenses.[6] Although the Espionage Act has its own conspiracy provisions,[7] a prosecution can be maintained under the general conspiracy statute,[8] which makes it illegal for anyone to conspire to violate any statute of the United States.[9]

Footnotes

1 U.S. v. Gordon, 138 F.2d 174 (C.C.A. 7th Cir. 1943); US v. Coplon, 88 F. Supp. 912 (S.D. N.Y. 1949).

2 Pierce v. U.S., 252 U.S. 239, 40 S. Ct. 205, 64 L. Ed. 542 (1920).

3 U.S. v. Abel, 258 F.2d 485 (2d Cir. 1958), judgment aff'd, 362 U.S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668 (1960).

4 Pierce v. U.S., 252 U.S. 239, 40 S. Ct. 205, 64 L. Ed. 542 (1920); U.S. v. Helmich, 704 F.2d 547 (11th Cir. 1983).

5 U.S. v. Helmich, 704 F.2d 547 (11th Cir. 1983).

6 U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980); U.S. v. Lee, 589 F.2d 980, 4 Fed. R. Evid. Serv. 326 (9th Cir. 1979); U.S. v. Enger, 472 F. Supp. 490 (D.N.J. 1978).

7 18 U.S.C.A. §§ 793(g), 794(c).

8 18 U.S.C.A. § 371.

9 US v. Coplon, 88 F. Supp. 912 (S.D. N.Y. 1949).

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§ 22. Punishment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, War and National Emergency 1125

A violation of the Espionage Act provision which prohibits the gathering, transmitting, or losing of defense information is punishable by a specified maximum sentence, or a fine, or both.[1] However, a violation of the provision which prohibits the communicating, delivering, or transmitting of defense information to a foreign government or authority is punishable by death, or by imprisonment for any term of years or for life, although the sentence of death will not be imposed except on a finding that the offense resulted in the death of a United States agent or directly concerned specified and other major weapons systems or major elements of defense strategy.[2] A violation of the provision which prohibits informing the enemy of troop movements and military plans or any other information relating to the public defense in time of war is punishable by death or by imprisonment for any term of years or for life.[3] The death penalty may also be imposed on one who informs the enemy, or who obtains information with intent to inform the enemy, of troop and ship movements, but this section applies only in time of war.[4]

Observation:

A question may exist as to whether imposing the death penalty for espionage constitutes "cruel and unusual punishment,"[5] and there is authority that the death-penalty provision of the provision of the espionage proscribing the gathering or delivering of defense information to aid a foreign government[6] is unconstitutional and void for lack of legislated guidelines to control the fact finder's discretion.[7]

The penalty for harboring or concealing persons known or reasonably believed to have committed or to be about to commit a violation of certain sections of the Espionage Act[8] is a fine, or imprisonment, or both.[9] The Espionage Act also provides penalties by fine, imprisonment, or both, for violations of its provisions relating to:

- the photographing of defense installations[10]
- the use of aircraft for photographing defense installations[11]
- the publication and sale of photographs of defense installations[12]
- the disclosure of classified information relating to communication intelligence activities of the government[13]
- the violation of a regulation of the National Aeronautics and Space Administration for the protection or security of its property or equipment[14]

The Subversive Activities Control Act specifies a punishment of imprisonment, or a fine, or both,[15] for violation of its provisions defining offenses in the nature of espionage.[16] In addition, the Act imposes as a penalty that any person so convicted shall be thereafter ineligible to hold any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.[17]

Footnotes

1 18 U.S.C.A. § 793.

2 18 U.S.C.A. § 794(a).
A prison term of 365 years with little prospect of parole for a defendant convicted of espionage and tax-evasion charges arising from his participation in an espionage ring did not constitute cruel and unusual punishment and was not disproportionate to his crimes. U.S. v. Whitworth, 856 F.2d 1268, 26 Fed. R. Evid. Serv. 929 (9th Cir. 1988).

3 18 U.S.C.A. § 794(b).

4 18 U.S.C.A. § 794(b).

5 Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (discussing U.S. Const. Amend. VIII).

6 18 U.S.C.A. § 794.

7 U.S. v. Harper, 729 F.2d 1216 (9th Cir. 1984).

8 18 U.S.C.A. §§ 793, 794.

9 18 U.S.C.A. § 792.

10 18 U.S.C.A. § 795(b), discussed at § 15.

11 18 U.S.C.A. § 796, discussed at § 15.

12 18 U.S.C.A. § 797, discussed at § 15.

13 18 U.S.C.A. § 798(a), discussed at § 15.

14 18 U.S.C.A. § 799, discussed at § 15.

15 50 U.S.C.A. § 783(c).

16 50 U.S.C.A. § 783(a), (b), discussed at § 16.

17 50 U.S.C.A. § 783(c).

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3. Elements of Offense

§ 23. General statutory elements of espionage

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, War and National Emergency 1125

The Espionage Act[1] defines at least as many separate crimes as the number of sections and subsections it contains.[2] It has been said that a conviction of espionage only requires proof that the defendant obtained possession of the documents or information and attempted to transmit them to a person not entitled to receive them.[3]

The primary essential elements of the espionage offenses may include, but are not limited to, the following:

(1) the subject information relates to the national defense,[4] or is classified secret information;[5]

(2) the accused acts with the intent or reason to believe the information will injure the United States or aid a foreign nation;[6]

(3) there is a willful communication, transfer, or receipt of the information;[7] or

(4) there is an overt act in furtherance of a conspiracy to commit espionage.[8]

Under the Espionage Act, the government is not required to prove that the United States was in fact injured.[9] Similarly, the government is not required, in action alleging a conspiracy to violate the Espionage Act, to prove that the individuals to whom defendants actually disclosed information were not entitled to receive it, or that the information defendants actually disclosed was closely held and damaging to national security.[10] Nor is it essential that the United States be at war with the country to whose agent the information is given in order to make a person providing such information guilty of espionage.[11] The Act does not make any distinction between friendly, neutral, and unfriendly countries, and it is as much a crime to transmit proscribed information to allied nations as to transmit it to enemy nations.[12]

Footnotes

1 18 U.S.C.A. §§ 792 et seq.

2 US v. Coplon, 88 F. Supp. 910 (S.D. N.Y. 1949).

3 US v. Coplon, 88 F. Supp. 910 (S.D. N.Y. 1949).

4 § 24.

5 § 26.

6 § 28.

7 § 28.

8 § 21.

9 United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952).

10 U.S. v. Rosen, 520 F. Supp. 2d 786 (E.D. Va. 2007).

11 U S v. Grote, 140 F.2d 413 (C.C.A. 2d Cir. 1944).

12 United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952); United States v. Heine, 151 F.2d 813 (C.C.A. 2d Cir. 1945).

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70 Am. Jur. 2d Sedition, Etc. § 24

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§ 24. Information related to national defense

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, War and National Emergency 1125

A.L.R. Library

What Matters Are Exempt from Disclosure Under Freedom of Information Act (5 U.S.C.A. § 552(b)(1)) as "Specifically Authorized Under Criteria Established by an Executive Order to be Kept Secret in the Interest of National Defense or Foreign Policy", 169 A.L.R. Fed. 495

Treatises and Practice Aids

Federal Procedure, L. Ed., Armed Forces, Civil Disturbances, and National Defense[Westlaw®(r): Search Query] (Discovery of military secrets)

Forms

Forms relating to espionage prosecutions, see Federal Procedural Forms, Armed Forces, Civil Disturbances, and National Defense[Westlaw®(r) Search Query]

Proof that the information gathered, transmitted, received, or unlawfully possessed actually relates to the national defense is an essential element of the espionage offenses so defined by the Espionage Act.[1] The legislative history of the Espionage Act demonstrates that Congress intended "national defense," the term used to describe the information protected from illegal transmission, to encompass a broad range of information and rejected attempts to narrow the reach of the statutory language.[2] The phrase does not limit the reach of the espionage statutes to strictly military matters.[3] It is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.[4]

The term is broader than the term "United States defense information" as used in another statute.[5] Further, "information" as used in the Espionage Act does not include only tangible information but also include information transmitted orally.[6] However, the connection of the information with the national defense must be reasonably direct and natural, not strained or arbitrary, to make the obtaining and delivery thereof a criminal offense.[7]

Footnotes

1 U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980); U.S. v. Lee, 589 F.2d 980, 4 Fed. R. Evid. Serv. 326 (9th Cir. 1979).

2 U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980).

3 U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980); U.S. v. Boyce, 594 F.2d 1246 (9th Cir. 1979).

4 Gorin v. U.S., 312 U.S. 19, 61 S. Ct. 429, 85 L. Ed. 488 (1941); U.S. v. Abu-Jihaad, 600 F. Supp. 2d 362 (D. Conn. 2009).

5 U.S. v. Attardi, 43 C.M.R. 388, 1971 WL 12805 (C.M.A. 1971).

6 U.S. v. Rosen, 445 F. Supp. 2d 602 (E.D. Va. 2006), opinion amended on other grounds, 2006 WL 5049154 (E.D. Va. 2006) and aff'd, 557 F.3d 192 (4th Cir. 2009).

7 Gorin v. U.S., 312 U.S. 19, 61 S. Ct. 429, 85 L. Ed. 488 (1941).

70 Am. Jur. 2d Sedition, Etc. § 25

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§ 25. Information related to national defense—Particular types of information

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, War and National Emergency 1125

Information related to the national defense is that which would be potentially damaging to the national defense or useful to an enemy of the United States, not information made public by Congress or the Department of Defense and found in sources lawfully available to the general public.[1] While the term "information relating to the national defense" excludes information made public by the government and publicly available information that the government has never protected, it may include closely held information that has become publicly available through other means.[2] A document containing official government information relating to the national defense will not be considered available to the public, and therefore no longer national defense information, until the official information in that document is lawfully available, and mere leaks of classified information are insufficient to prevent a prosecution for the transmission of a classified document that is the official source of the leaked information.[3]

The classification of documents is relevant to whether they are related to the national defense,[4] and may be so considered, but that alone is insufficient to meet the test of a national defense relation and should not be greatly emphasized.[5] The propriety of the classification of "national defense" information as top secret is irrelevant.[6] The statute does not define the protected information in terms of its security classification or marking.[7]

Practice Tip:

In a prosecution for the violation of the section of the Espionage Act dealing with certain activities involving gathering, transmitting, or losing defense information[8] where the propriety of the classification of information is considered irrelevant, a defendant's opinion testimony with respect to abuses of the government's system of classifying information is properly excluded.[9]

Footnotes

1 U.S. v. Dedeyan, 584 F.2d 36 (4th Cir. 1978).

2 U.S. v. Squillacote, 221 F.3d 542, 55 Fed. R. Evid. Serv. 443 (4th Cir. 2000).

3 U.S. v. Squillacote, 221 F.3d 542, 55 Fed. R. Evid. Serv. 443 (4th Cir. 2000).

4 U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980); U.S. v. Dedeyan, 584 F.2d 36 (4th Cir. 1978).

5 U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980); U.S. v. Enger, 472 F. Supp. 490 (D.N.J. 1978).

6 U.S. v. Lee, 589 F.2d 980, 4 Fed. R. Evid. Serv. 326 (9th Cir. 1979).

7 U.S. v. Lee, 589 F.2d 980, 4 Fed. R. Evid. Serv. 326 (9th Cir. 1979).

8 18 U.S.C.A. § 793.

9 U.S. v. Dedeyan, 584 F.2d 36 (4th Cir. 1978).

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70 Am. Jur. 2d Sedition, Etc. § 26

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§ 26. Classified information under the Espionage Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, War and National Emergency 1125

Definition:

The Espionage Act defines "classified information" as information which, at the time of the violation of the statute, is, for reasons of national security, specifically designated by a United States government agency for limited or restricted dissemination or distribution.[1]

Furnishing classified information to an unauthorized person concerning the communication intelligence activities of the United States, or publishing or using it to the prejudice of the United States or benefit of a foreign country, is made a crime under the Espionage Act.[2] The classified status of the information is necessarily an element of this offense.[3] The classification of government documents or information as confidential or secret is also made an essential element of the espionage defenses under the Subversive Activities Control Act.[4]

In considering the classification element, the propriety of the classification is irrelevant, and the fact of classification of a document or information alone is enough.[5] The government's system of classification is binding on civilians as well as government employees.[6] In order to establish documents or information as classified, it is not necessary to show that the president personally classified the documents.[7]

Footnotes

1 18 U.S.C.A. § 798(b).

2 18 U.S.C.A. § 798(a).

3 U.S. v. Boyce, 594 F.2d 1246 (9th Cir. 1979); Weberman v. National Sec. Agency, 490 F. Supp. 9 (S.D. N.Y. 1980).

4 U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980), referring to the offenses defined by 50 U.S.C.A. § 783(a), (b).

5 U.S. v. Boyce, 594 F.2d 1246 (9th Cir. 1979) (applying 18 U.S.C.A. § 798).
Foreign-service dispatches classified as "secret" or "confidential" pursuant to Executive Order are "classified" within the meaning of 50 U.S.C.A. § 783(b). Scarbeck v. U.S., 317 F.2d 546 (D.C. Cir. 1962).

6 U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980).

7 U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980).

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§ 27. Classified information under the Espionage Act —Effect of Federal Freedom of Information Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, War and National Emergency 1125

A.L.R. Library

What Matters Are Exempt from Disclosure Under Freedom of Information Act (5 U.S.C.A. § 552(b)(1)) as "Specifically Authorized Under Criteria Established by an Executive Order to be Kept Secret in the Interest of National Defense or Foreign Policy", 169 A.L.R. Fed. 495

Treatises and Practice Aids

Federal Procedure, L. Ed., Armed Forces, Civil Disturbances, and National Defense[Westlaw®(r): Search Query] (Discovery of military secrets)

Forms

Forms relating to classified information, see Am. Jur. Pleading and Practice Forms, War [Westlaw®(r) Search Query]

Whether information or documents can be properly characterized as constituting classified information concerning the communication intelligence activities of the United States, as protected by the Espionage Act, may provide a basis for a refusal of the government to disclose such information under the Federal Freedom of Information Act.[1] A showing of potential harm to national security, which is necessary under the Federal Freedom of Information Act exemption permitting a refusal to disclose matters specifically authorized by executive order to be kept secret in the interest of national defense or foreign policy, is not required in order for a refusal to disclose to be proper under the exemption[2] permitting refusal to disclose matters specifically exempted by statute.[3]

Footnotes

1 Weberman v. National Sec. Agency, 490 F. Supp. 9 (S.D. N.Y. 1980).
The Freedom of Information Act exempts from disclosure information that has been specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy. 5 U.S.C.A. § 552(b)(1).
The exemption under the Freedom of Information Act for documents specifically exempted from disclosure by statute applies to classified documents that concern dealings with the Foreign Intelligence Surveillance court and other documents containing information that would reveal intelligence sources and methods. New York Times Co. v. U.S. Department of Defense, 499 F. Supp. 2d 501 (S.D. N.Y. 2007).
For further discussion of the Freedom of Information Act, see Am. Jur. 2d, Freedom of Information Acts §§ 1 et seq.

2 5 U.S.C.A. § 552(b)(3).

3 Weberman v. National Sec. Agency, 490 F. Supp. 9 (S.D. N.Y. 1980).

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70 Am. Jur. 2d Sedition, Etc. § 28

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§ 28. Willfulness, intent, or reason to believe

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, War and National Emergency 1125

The scienter element of some offenses under the Espionage Act[1] requires the prosecution to prove that the defendant acted with intent or reason to believe that the transmission, receipt, or possession of information relating to the national defense would injure the United States or aid a foreign nation.[2] "Reason to believe" means that the defendant must be shown to have known facts from which the defendant concluded or reasonably should have concluded that the information he or she transmitted could be used for the prohibited purposes.[3] In this sense, the defendant must be found to have acted willfully, which means voluntarily and intentionally, and with a specific intent to do what the law forbids.[4] Within the meaning of the espionage statute, an act is done knowingly if done voluntarily and intentionally and not because of a mistake, accident, or other innocent reason.[5] This element is not satisfied by proof of mere negligence[6] although gross negligence is an element of one espionage offense.[7]

It is not necessary that the defendant know for certain that his or her compromise of the document or information would injure the United States or aid another country since the defendant's reasonable belief to that end identifies his or her conduct as that from which injury to the United States or aid to a foreign country could certainly be inferred.[8] Nor is the government required to establish that the intent was both to injure the United States and to give an advantage to a foreign nation[9] as proof of either will suffice.[10] The government is not required to show that the defendant acted with "bad faith" or with a "purpose either to disobey or to disregard the law" to obtain a conviction as a jury can convict a defendant if it finds that the defendant voluntarily and intentionally committed the acts charged and that the defendant acted with the intent or with a reason to believe that the documents the defendant delivered, if any, would be used to harm the United States or benefit a foreign government.[11] Further, a defendant can be convicted of communicating confidential information to a foreign government with the intent to harm the

United States or to aid a foreign government even if the defendant mistakenly believes that his or her actions will benefit the United States as the defendant's belief that his or her actions will help the United States has to have been reasonable.[12]

The text of certain other parts of the Espionage Act seems to require less to support a conviction.[13] For example, the scienter requirement of the section of the Espionage Act relating to the willful transmission or retention of national defense information[14] states only that the possessor must have reason to believe the information could be used to the injury of the United States or to the advantage of any foreign nation. Even so, this less-stringent language still requires that the accused have willfully transmitted or retained the information.[15] Taken together, these elements require the defendant to have acted in bad faith or with a design to mislead or deceive another rather than being prompted by an honest mistake.[16]

Observation:

The "reason to believe" clause does not apply to prosecutions of individuals charged with providing documents relating to the national defense.[17]

Footnotes

1 18 U.S.C.A. §§ 793(b), (c), 794(a).

2 Gorin v. U.S., 312 U.S. 19, 61 S. Ct. 429, 85 L. Ed. 488 (1941); U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980); U.S. v. Enger, 472 F. Supp. 490 (D.N.J. 1978).

3 U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980) (applying 18 U.S.C.A. § 794(a), (b)).

4 U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980); U.S. v. Lee, 589 F.2d 980, 4 Fed. R. Evid. Serv. 326 (9th Cir. 1979) (affirming conviction).

5 U.S. v. Lee, 589 F.2d 980, 4 Fed. R. Evid. Serv. 326 (9th Cir. 1979) (affirming conviction).

6 U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980).

7 18 U.S.C.A. § 793(f).

8 U.S. v. Dedeyan, 584 F.2d 36 (4th Cir. 1978).

9 Gorin v. U.S., 312 U.S. 19, 61 S. Ct. 429, 85 L. Ed. 488 (1941); U.S. v. Drummond, 354 F.2d 132 (2d Cir. 1965).

10 Gorin v. U.S., 312 U.S. 19, 61 S. Ct. 429, 85 L. Ed. 488 (1941).

11 U.S. v. Miller, 874 F.2d 1255, 28 Fed. R. Evid. Serv. 23 (9th Cir. 1989) (convictions under 18 U.S.C.A. §§ 793(b), 794(a)).

12 U.S. v. Miller, 874 F.2d 1255, 28 Fed. R. Evid. Serv. 23 (9th Cir. 1989).

13 18 U.S.C.A. § 793(d), (e), (f).

14 18 U.S.C.A. § 793(e).

15 U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980).

16 U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980) (applying 18 U.S.C.A. § 793(e), in contrast with 18 U.S.C.A. § 794(a)).

17 U.S. v. Drake, 818 F. Supp. 2d 909 (D. Md. 2011) (noting that finding of willfulness thus did not require a heightened mens rea).

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70 Am. Jur. 2d Sedition, Etc. § 29

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B. Espionage

3. Elements of Offense

§ 29. Unauthorized possession

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, War and National Emergency 1125

Unauthorized possession of national defense information is an essential element of the section of the Espionage Act that proscribes gathering, transmitting, or losing defense information to be used to the injury of the United States or to the advantage of any foreign nation[1] which further proscribes the willful transmission or retention of such information reasonably believed to be usable to the injury of the United States or to the advantage of a foreign nation.[2] Under this phrase, a person would have authorized possession if the person had an appropriate security clearance and gained access to the document or information because it was necessary to the performance of his or her official duties.[3]

Footnotes

1 18 U.S.C.A. § 793(e).

2 U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980).

3 U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980).

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70 Am. Jur. 2d Sedition, Etc. § 30

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4. Proof and Defenses

§ 30. Proof

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, War and National Emergency 1125

The two-witness rule applicable to prosecutions for treason, by virtue of an express provision of the United States Constitution,[1] is not applicable to a prosecution for an offense of espionage since espionage is not merely the offense of treason by another name.[2]

A confession of guilt to charges of espionage is sufficient to support a conviction where there is corroborative evidence supporting the essential facts submitted by the accused and justifying a jury inference of their truth.[3] The corroborative evidence need not be sufficient, independent of the confession, to establish the corpus delecti.[4]

Observation:

Evidence on how many persons there were in the government and under government contracts with a "Secret" classification was inadmissible in a prosecution of a military-intelligence employee under certain provisions of the Espionage Act[5] proscribing gathering, transmitting, or losing defense information.[6]

Footnotes

1 U.S. Const. Art. III, § 3.
As to two-witness rule applicable to prosecutions for treason, see § 72.

2 U.S. v. Drummond, 354 F.2d 132 (2d Cir. 1965) (applying 18 U.S.C.A. § 794).

3 U.S. v. Kampiles, 609 F.2d 1233, 5 Fed. R. Evid. Serv. 922 (7th Cir. 1979).

4 U.S. v. Kampiles, 609 F.2d 1233, 5 Fed. R. Evid. Serv. 922 (7th Cir. 1979).

5 18 U.S.C.A. § 793(d), (e).

6 U.S. v. Morison, 844 F.2d 1057, 25 Fed. R. Evid. Serv. 647 (4th Cir. 1988) (rejected on other grounds by, U.S. v. McAusland, 979 F.2d 970 (4th Cir. 1992)).

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§ 31. Proof—Electronic surveillance

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In a prosecution for conspiracy to violate and for violation of espionage laws, the burden is on the government to establish that evidence it intended to offer to substantiate the charges sprang from independent sources, untainted by and not traceable to the unlawful wiretapping of telephones.[1] However, under Title III of the Omnibus Crime Control and Safe Streets Act,[2] the government may seek to obtain authorization and approval for wire interception and interception of oral communications—a wiretap—to provide evidence of the commission of the offense of espionage.[3]

Footnotes

1 U.S. v. Coplon, 88 F. Supp. 921 (S.D. N.Y. 1950).

2 18 U.S.C.A. §§ 2510 to 2522.

3 Federal Procedure, L. Ed. §§ 22:259, 22:260.

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§ 32. Defenses

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Treatises and Practice Aids

Federal Procedure, L. Ed., Armed Forces, Civil Disturbances, and National Defense[Westlaw®(r): Search Query] (Discovery of military secrets)

Trial Strategy

Handling the Defense in a Conspiracy Prosecution, 20 Am. Jur. Trials 351

Forms

Forms relating to espionage prosecutions, see Federal Procedural Forms, Armed Forces, Civil Disturbances, and National Defense[Westlaw®(r) Search Query]

Forms related to wiretaps, generally, see Federal Procedural Forms, Criminal Law[Westlaw®(r) Search Query]

One cannot be convicted of violating the Espionage Act if the information transmitted was made available to the public by the government, or if the information was available to everyone from lawfully accessible sources, or if the government did not attempt to restrict its dissemination.[1] However, the improper classification of documents as secret and as relating to the national defense is not a defense to charges of espionage, and the mere fact of their classification or relation to national defense suffices as the basis for the offense.[2]

Employment by the Central Intelligence Agency, or a reasonable belief in such employment, and that the accused's alleged actions of espionage were undertaken on the government's behalf, has been raised as a defense to charges of transmitting, gathering, receiving, or possessing national defense information, and attempting and conspiring to accomplish same.[3] This defense went to negating the prosecution's proof that the defendant had acted with the required specific intent, knowingly and willfully violating the espionage statutes.[4]

Diplomatic immunity is not a good and sufficient defense to charges of espionage, in the absence of proof that the defendant:[5]

(1) is a foreign minister or the diplomatic agent of a foreign nation, having been notified to or accepted by the United States Department of State as such prior to the date of the conduct which gives rise to the charges of espionage, or

(2) is the employee of an international organization, as defined by the International Organization Immunities Act.[6]
The defendant must also show that the conduct giving rise to the charges of espionage related to acts performed by the defendant in his or her official capacity and falling within the defendant's function as such an employee.[7]

Footnotes

1 United States v. Heine, 151 F.2d 813 (C.C.A. 2d Cir. 1945).
The defendant failed to establish that information in the classified reports that he transmitted to the agent of a foreign government was publicly available at the time he sent it as required to prove actual innocence as a defense to prosecution for the unlawful communication of classified information by a government employee. Fondren v. U.S., 63 F. Supp. 3d 601 (E.D. Va. 2014), appeal dismissed, 600 Fed. Appx. 895 (4th Cir. 2015), cert. denied, 136 S. Ct. 428, 193 L. Ed. 2d 319 (2015).

2 U.S. v. Dedeyan, 584 F.2d 36 (4th Cir. 1978).

3 U.S. v. Lee, 589 F.2d 980, 4 Fed. R. Evid. Serv. 326 (9th Cir. 1979) (affirming conviction).

4 U.S. v. Lee, 589 F.2d 980, 4 Fed. R. Evid. Serv. 326 (9th Cir. 1979) (affirming conviction).

5 U.S. v. Enger, 472 F. Supp. 490 (D.N.J. 1978).

6 22 U.S.C.A. §§ 288 et seq.

7 U.S. v. Enger, 472 F. Supp. 490 (D.N.J. 1978).

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§ 33. General procedural rules

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Validity and construction of Classified Information Procedures Act (18 U.S.C.A. App. 3 §§ 1-16), 103 A.L.R. Fed. 219

The Classified Information Procedures Act provides for pretrial, trial, and appellate procedures and criminal cases involving classified information.[1] The requirement for defense counsel to inspect and examine classified government documents while the documents remain in the government's possession does not deprive the defendant of any of his or her discovery rights despite the fact that the limitation on access may be inconvenient to defense counsel.[2] Moreover, examination of certain classified materials may be limited to an in camera review by the court to determine whether the documents contain any exculpatory matter discoverable by the defense but otherwise not subject to disclosure.[3]

The trial for any offense involving a violation, begun or committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, of certain provisions of the Subversives Control Act[4] or the Espionage Act,[5] may be in the District of Columbia or in any other district authorized by law.[6]

Observation:

An accused, charged with espionage by an attempt to transmit classified material to persons not entitled to possession, is entitled to have the trial judge determine the extent to which the public would be excluded from the trial even though the prosecution meets its burden of proving the nature of the classified materials since it is an error of constitutional magnitude to exclude the public from all of a given witness' testimony where less than the whole is devoted to classified material.[7]

Footnotes

1 18 U.S.C.A. App. 3 §§ 1 et seq.

2 U.S. v. Boyce, 594 F.2d 1246 (9th Cir. 1979).

3 U.S. v. Boyce, 594 F.2d 1246 (9th Cir. 1979).

4 50 U.S.C.A. § 783.

5 18 U.S.C.A. §§ 793, 794, 798.

6 18 U.S.C.A. § 3239.

7 U. S. v. Grunden, 2 M.J. 116 (C.M.A. 1977) (offense under 18 U.S.C.A. § 793(d)).

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§ 34. Jurisdiction

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The Espionage Act was originally limited to the admiralty and maritime jurisdiction of the United States, on the high seas, and to conduct within the United States.[1] However, this limitation was repealed with a clear legislative intent to extend application of the act to cover actions committed anywhere in the world.[2] A defendant accused of espionage may not successfully challenge the court's jurisdiction by alleging that the indictment fails to state the occurrence of any act within the territorial jurisdiction of the United States, where the defendant has been at all times a citizen of the United States, since the defendant's actions, whether taken at home or abroad, are subject to the laws of the United States proscribing espionage.[3]

Footnotes

1 18 U.S.C.A. § 791 (repealed).

2 U.S. v. Helmich, 521 F. Supp. 1246 (M.D. Fla. 1981), judgment aff'd, 704 F.2d 547 (11th Cir. 1983).
The Espionage Act applies to extraterritorial acts of espionage committed by citizens and noncitizens alike.
U.S. v. Zehe, 601 F. Supp. 196 (D. Mass. 1985).

3 U.S. v. Helmich, 521 F. Supp. 1246 (M.D. Fla. 1981), judgment aff'd, 704 F.2d 547 (11th Cir. 1983).

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§ 35. Jurisdiction—Courts-martial jurisdiction

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Assuming that an accused is otherwise subject to the jurisdiction of a court-martial under the Uniform Code of Military Justice and under the Constitution, the accused may be subject to trial by courts-martial for acts violative of the general espionage statute[1] because such acts are not punishable as capital offenses.[2] On the other hand, since a violation of the provision outlawing certain acts of espionage involving the gathering or delivering of defense information to aid a foreign government[3] is a capital offense punishable by death, a court-martial does not have jurisdiction to try a member of the military who is accused of that offense in an area where the federal civilian courts can operate.[4] Where the violation allegedly occurs in a foreign country, the service member is subject to court-martial jurisdiction, with the limitation that the offense cannot be treated as a capital offense.[5]

Footnotes

1 18 U.S.C.A. § 793.

2 U.S. v. Perkins, 47 C.M.R. 259, 1973 WL 14711 (A.F.C.M.R. 1973); U.S. v. Kirsch, 35 C.M.R. 56, 1964 WL 4925 (C.M.A. 1964).
As to courts-martial jurisdiction, generally, see Federal Procedure, L. Ed., Armed Forces, Civil Disturbances, and National Defense[Westlaw®(r): Search Query].

3 18 U.S.C.A. § 794.

4 U.S. v. Northrup, 31 C.M.R. 599, 1961 WL 4627 (A.F.B.R. 1961).

5 U.S. v. Northrup, 31 C.M.R. 599, 1961 WL 4627 (A.F.B.R. 1961).

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§ 36. Statute of limitations

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An indictment for any offense punishable by death may be found at any time without limitation.[1] This provision[2] provides the appropriate time period for an indictment charging a violation of the statute[3] proscribing communicating to a foreign government any information relating to the national defense.[4]

The Subversive Activities Control Act specifies a limitations period applicable to the offenses it defines in the nature of espionage.[5] The Act specifies that the prosecution must be initiated within 10 years after the commission of the offense, notwithstanding the provisions of any other statute of limitations, although an exception is made for an alleged violator who is an officer or employee of the United States, whereby the 10-year limitation period does not begin to run until such person has ceased to be employed as an officer or employee of the government.[6]

Observation:

An alleged 17-year delay in bringing an indictment for espionage is not per se prejudicial and violative of the defendant's due-process rights.[7] The defendant is not entitled to relief unless he or she can show actual prejudice or intentional wrongdoing on the part of the government, and mere allegations of lost witnesses and the failure of memories from the passage of time are insufficient to meet the standard.[8]

Footnotes

1 18 U.S.C.A. § 3281.

2 18 U.S.C.A. § 3281.

3 18 U.S.C.A. § 794.

4 U.S. v. Helmich, 521 F. Supp. 1246 (M.D. Fla. 1981), judgment aff'd, 704 F.2d 547 (11th Cir. 1983).

5 50 U.S.C.A. § 783(a), (b).

6 50 U.S.C.A. § 783(d).

7 U.S. v. Helmich, 521 F. Supp. 1246 (M.D. Fla. 1981), judgment aff'd, 704 F.2d 547 (11th Cir. 1983).

8 U.S. v. Helmich, 521 F. Supp. 1246 (M.D. Fla. 1981), judgment aff'd, 704 F.2d 547 (11th Cir. 1983).

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§ 37. Indictment

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Forms

Forms relating to espionage prosecutions, see Federal Procedural Forms, Armed Forces, Civil Disturbances, and National Defense[Westlaw®(r) Search Query]

An indictment for espionage must allege all the elements of the offense charged and where all are included within the statutory language, it is appropriate procedure for the indictment to track the statutory language in charging the offense.[1] It should inform the defendant of the nature of the charges against him or her, provide adequate notice to prepare a defense, describe the defendant's criminal venture sufficiently to protect the defendant against subsequent prosecution, and so inform the court that it may decide whether the facts alleged are sufficient in law to support a conviction.[2] Absent a request at trial for more particulars, a specification alleging an espionage offense[3] in substantially the exact language of the statute is sufficient although the "person not entitled to receive classified documents," to whom the defendant allegedly communicated or transmitted the information, is not identified by name.[4]

The secret or nonpublic nature of information gathered or transmitted in violation of the espionage statute need not be alleged in the indictment as an essential element of the offense where the indictment otherwise tracks the statutory language.[5] The words "classified secret," however, are not mere surplusage in an indictment for espionage, relating to the failure to report the

removal of national defense documents from their proper place of custody, despite the fact that the statute does not specify that the documents must be secret, since the words tend to show or make more probable that the document in question in fact relates to the national defense within the meaning of the statute.[6]

An indictment for conspiracy to commit espionage need only allege one overt act done to effectuate the conspiracy.[7] An indictment for conspiracy to transmit secret information to a foreign power[8] was not duplicitous, in violation of Wharton's Rule that an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission.[9]

A defendant may not challenge the prosecution's choice of statute in bringing its charges of espionage against the defendant on the ground that a more specific espionage statute is applicable to the defendant's conduct[10] since the government has the discretion to determine what crime it will prosecute for a conviction when a given set of facts permits a choice.[11]

Footnotes

1 U.S. v. Lee, 589 F.2d 980, 4 Fed. R. Evid. Serv. 326 (9th Cir. 1979); U.S. v. Enger, 472 F. Supp. 490 (D.N.J. 1978).

2 U.S. v. Enger, 472 F. Supp. 490 (D.N.J. 1978).

3 18 U.S.C.A. § 793(e).

4 U.S. v. Perkins, 47 C.M.R. 259, 1973 WL 14711 (A.F.C.M.R. 1973).

5 United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952); U.S. v. Enger, 472 F. Supp. 490 (D.N.J. 1978).

6 U.S. v. Dedeyan, 584 F.2d 36 (4th Cir. 1978).

7 U.S. v. Enger, 472 F. Supp. 490 (D.N.J. 1978).

8 18 U.S.C.A. § 794(c).

9 U.S. v. Helmich, 704 F.2d 547 (11th Cir. 1983).

10 U.S. v. Helmich, 521 F. Supp. 1246 (M.D. Fla. 1981), judgment aff'd, 704 F.2d 547 (11th Cir. 1983).

11 U.S. v. Helmich, 521 F. Supp. 1246 (M.D. Fla. 1981), judgment aff'd, 704 F.2d 547 (11th Cir. 1983).

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§ 38. Jury instructions

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The jury should be specifically instructed that the transmission of publicly available information does not fall within the statutory prohibitions.[1] The instructions should not emphasize the classification of documents or their official nature and being determinative of whether their transmission would injure the United States or aid a foreign nation, or whether the documents are related to the national defense, although both factors are relevant and should be considered.[2] Instructions to the jury need not state the defendant's theory of his or her case in the precise language requested by the defendant, provided the charge as a whole adequately covers the theory of the defense.[3]

Observation:

In the prosecution of a military-intelligence employee for the unauthorized transmittal of satellite-secured photographs to a periodical publisher, the jury instructions on "willful transmittal" and "national defense" removed any possibility of vagueness in the application of the espionage statutes, as willfully was defined as "with specific intent to do something that the law forbids" and national defense was defined as "including all matters that directly or could reasonably be connected with the defense of the United States against any of its enemies."[4]

Jury instructions may offer a limiting construction of the espionage statute, specifically defining the proscribed conduct and that which must be shown to establish guilt, thereby curing a potential problem of overbreadth in the statutory language in violation of constitutional standards.[5] To this end, the instruction should define:[6]

- the relationship between the proscribed conduct and the national defense or actual or potential injury to the United States
- the general nature of information not protected by the statute, in terms of its lawful availability to the general public
- the nature and general content of the information which the statute seeks to protect and hold confidential

Footnotes

1 U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980).

2 U.S. v. Truong Dinh Hung, 629 F.2d 908, 6 Fed. R. Evid. Serv. 449 (4th Cir. 1980).

3 U.S. v. Lee, 589 F.2d 980, 4 Fed. R. Evid. Serv. 326 (9th Cir. 1979).

4 U.S. v. Morison, 844 F.2d 1057, 25 Fed. R. Evid. Serv. 647 (4th Cir. 1988) (rejected on other grounds by, U.S. v. McAusland, 979 F.2d 970 (4th Cir. 1992)).

5 U.S. v. Dedeyan, 584 F.2d 36 (4th Cir. 1978).

6 U.S. v. Dedeyan, 584 F.2d 36 (4th Cir. 1978).

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§ 39. Questions of law and fact

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In a prosecution for violation of a provision of the Espionage Act making it a crime to obtain and deliver to an agent of a foreign power information connected with or relating to the national defense,[1] it is the function of the court to instruct the jury as to the kind of information which violates the statute, and the function of the jury to determine whether the information alleged and shown to have been obtained and delivered was of the kind defined in the instructions.[2] Thus, a trial court's charge in a prosecution for a violation of that statute properly left to the jury the issue of government document classification and its bearing, if any, upon whether abstracted documents related to the national defense.[3]

Footnotes

1 18 U.S.C.A. § 793.

2 Gorin v. U.S., 312 U.S. 19, 61 S. Ct. 429, 85 L. Ed. 488 (1941); U. S. v. Grunden, 2 M.J. 116 (C.M.A. 1977).

3 U.S. v. Dedeyan, 584 F.2d 36 (4th Cir. 1978).

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Research References

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West's Key Number Digest, War and National Emergency 1126

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A.L.R. Index, Constitutional Law
A.L.R. Index, Criminal Law
A.L.R. Index, Sedition, Subversive Activities, and Treason
West's A.L.R. Digest, War and National Emergency 1126

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C. Sabotage

1. In General

§ 40. Power to proscribe sabotage; background

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West's Key Number Digest, War and National Emergency 1126

Definition:

"National defense," within the meaning of the Sabotage Act provision prohibiting persons from acting with intent to interfere with the national defense, is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.[1] It is a function, not a resource, object, or idea.[2] Specifically, the "national defense" refers to the nation's capacity to wage war and defend attacks.[3]

Congress has the power to prescribe criminal penalties for those who engage in sabotage.[4] The federal statutes dealing with sabotage[5] make it a crime to willfully injure or destroy, in time of war or in time of national emergency, any war material, war premises, or war utilities,[6] and further make it a crime to willfully make or construct in a defective manner any war material, war premises, or war utilities.[7] Similarly, it is a crime to injure or destroy any national-defense material, national-defense premises, or national-defense utilities,[8] or to attempt to make or construct such items in a defective manner.[9]

Congress has imposed a registration requirement on every person who has knowledge of, who has received instruction or assignment in, the sabotage service or tactics of a foreign government or foreign political party.[10]

Observation:

The basic Sabotage Act[11] was enacted during World War I in 1918 and was designed to apply only in time of war, proscribing conduct detrimental to the war effort.[12] The statute was later amended, adding what is sometimes called the "peacetime provision" of the Sabotage Act,[13] to afford protection of national-defense activities against sabotage when the United States was not at war.[14] In 1953, the sabotage statutes were further amended to the effect that certain provisions[15] would remain in full force and effect until six months after the termination of a national emergency proclaimed by the president on December 16, 1950, relating to the Korean conflict.[16] The statutes remain in full force and effect to the extent that the 1950 presidential emergency proclamation has not been terminated either by the president or by concurrent resolution of Congress.[17]

A statute prohibits the willful or malicious injury, destruction, or interference with the workings of any radio, telegraph, telephone or cable, line, station, or system, or other means of communication, operated or controlled by the United States, or used or intended to be used for military or civil defense functions of the United States.[18] The term "military function," as used in this statute, should be given broad scope.[19]

Footnotes

1 U.S. v. Walli, 785 F.3d 1080 (6th Cir. 2015).

2 U.S. v. Walli, 785 F.3d 1080 (6th Cir. 2015).

3 U.S. v. Walli, 785 F.3d 1080 (6th Cir. 2015).

4 U.S. v. Robel, 389 U.S. 258, 88 S. Ct. 419, 19 L. Ed. 2d 508 (1967).

5 18 U.S.C.A. §§ 2151 to 2156.

6 18 U.S.C.A. § 2153.

7 18 U.S.C.A. § 2154.

8 18 U.S.C.A. § 2155.
As to the provision of the Subversive Activities Control Act making it unlawful to violate any security regulation of the Defense Department or the National Aeronautics and Space Administration, 50 U.S.C.A. § 797(a), see § 16.

9 18 U.S.C.A. § 2156.

10 50 U.S.C.A. § 851, discussed at § 52.

11 18 U.S.C.A. § 2153(a).

12 U.S. v. Achtenberg, 459 F.2d 91, 24 A.L.R. Fed. 891 (8th Cir. 1972).

13 U.S. v. Walli, 785 F.3d 1080 (6th Cir. 2015) (referring to 18 U.S.C.A. § 2155(a)).

14 U.S. v. Achtenberg, 459 F.2d 91, 24 A.L.R. Fed. 891 (8th Cir. 1972).

15 18 U.S.C.A. §§ 2153, 2154.

16 U.S. v. Lee, 589 F.2d 980, 4 Fed. R. Evid. Serv. 326 (9th Cir. 1979).

17 U.S. v. Lee, 589 F.2d 980, 4 Fed. R. Evid. Serv. 326 (9th Cir. 1979).

18 18 U.S.C.A. § 1362.

19 U.S. v. Turpin, 65 F.3d 1207 (4th Cir. 1995).

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C. Sabotage

1. In General

§ 41. Constitutionality

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Terms defined under the definitions provision of the sabotage statutes,[1] including the terms "defense activities," "reason to believe," "national emergency," "preparing for," "war material," and "war premises," have survived a constitutional challenge for vagueness and overbreadth,[2] as has the term "national defense."[3] These statutory terms are not so vague that people of common intelligence must necessarily guess at their meaning and differ as to their application, and the statute gives a person of ordinary intelligence fair notice that his or her conduct is forbidden by the statute.[4]

Footnotes

1 18 U.S.C.A. § 2151.

2 U.S. v. Achtenberg, 459 F.2d 91, 24 A.L.R. Fed. 891 (8th Cir. 1972).

3 U.S. v. Platte, 401 F.3d 1176 (10th Cir. 2005).

4 U.S. v. Achtenberg, 459 F.2d 91, 24 A.L.R. Fed. 891 (8th Cir. 1972).

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C. Sabotage

1. In General

§ 42. Construction and application

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The federal sabotage statute is designed to deal with activities in time of war and national emergency, and conceives of sabotage as the willful destruction of war material and defense plants, as well as the defective construction or manufacture of war premises or war material.[1] The language of the sabotage statute, and its definitions of the terms which control the scope and reach of the offense, when considered together with its legislative history, show that Congress intended the coverage to be broad.[2]

Footnotes

1 18 U.S.C.A. §§ 2151 et seq.

2 U.S. v. Achtenberg, 459 F.2d 91, 24 A.L.R. Fed. 891 (8th Cir. 1972).

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1. In General

§ 43. Conspiracy

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, War and National Emergency 1126

Trial Strategy

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The sabotage statutes generally provide that two or more persons conspiring to violate the provisions of a particular sabotage statute may be found guilty and punished to the same extent as persons who actually commit the proscribed acts, provided one or more of the coconspirators do an act to effect the object of the conspiracy.[1]

Observation:

The addition of the conspiracy provisions of the sabotage statutes was strongly urged by the Criminal Division of the Department of Justice on the grounds that, considering the gravity of the substantive offense as evidenced by the prescribed punishment, the penal provisions of the general conspiracy statute[2] are inadequate.[3]

A corporation and individual defendants found not guilty of charges, under the sabotage laws, that they made defective war materials,[4] can be found guilty of charges in an indictment charging them with conspiracy to defraud the United States government in its war efforts.[5] Conversely, acquittal on a count of an indictment charging conspiracy to violate the sabotage statute does not bar conviction on a count charging the substantive offense of making war material in a defective manner.[6]

Footnotes

1 18 U.S.C.A. §§ 2153(b), 2154(b), 2155(b), 2156(b).

2 18 U.S.C.A. § 371.

3 Historical and Statutory Notes to 18 U.S.C.A. §§ 2153, 2154.
As to the punishment for conspiracy to commit sabotage, as well as punishment for the substantive sabotage offenses, see § 45.

4 18 U.S.C.A. § 2154.

5 U.S. v. Antonelli Fireworks Co., 155 F.2d 631 (C.C.A. 2d Cir. 1946).

6 Schmeller v. U. S., 143 F.2d 544 (C.C.A. 6th Cir. 1944).

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70 Am. Jur. 2d Sedition, Etc. § 44

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1. In General

§ 44. Magnuson Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, War and National Emergency 1126

The Magnuson Act authorizes the president, upon a finding that the security of the United States is endangered by reason of actual or threatened war, invasion, insurrection, subversive activity, or of disturbances or threatened disturbances of the international relations of the United States,[1] to institute such measures and issue such rules and regulations to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of a similar nature, of vessels, harbors, ports, and waterfront facilities in the United States or its territories and waters.[2] The Act does not authorize the executive to ferret out ideological strays in the maritime industry.[3]

CUMULATIVE SUPPLEMENT

Statutes:

50 U.S.C.A. § 191 was renumbered as 46 U.S.C.A. § 70051, effective December 4, 2018.

[END OF SUPPLEMENT]

Footnotes

1 50 U.S.C.A. § 191.

2 50 U.S.C.A. § 191(b).

3 Schneider v. Smith, 390 U.S. 17, 88 S. Ct. 682, 19 L. Ed. 2d 799 (1968).

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70 Am. Jur. 2d Sedition, Etc. § 45

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1. In General

§ 45. Punishment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, War and National Emergency 1126

The punishment prescribed under the sabotage statutes is a fine or imprisonment, or both.[1] In sentencing the defendants for the destruction of national-defense materials under one of the sabotage statutes[2] under the sentencing guideline allowing a departure based on the seriousness of the offense, a trial court can depart downward on the ground that the offense does not involve a foreign power.[3]

The punishment prescribed for a willful trespass upon, injury to, or destruction of harbor defenses or defensive sea areas is a fine or imprisonment, or both.[4]

Footnotes

1 18 U.S.C.A. §§ 2153 to 2156.

2 18 U.S.C.A. § 2155.

3 U.S. v. Sicken, 223 F.3d 1169 (10th Cir. 2000).

4 18 U.S.C.A. § 2152.

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70 Am. Jur. 2d Sedition, Etc. § 46

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C. Sabotage

2. Elements of Offense

§ 46. Essential elements of sabotage under federal statute

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, War and National Emergency 1126

A.L.R. Library

Essential elements of offense under 18 U.S.C.A. § 2153(a) of destroying war material, war premises, or war utilities, 24 A.L.R. Fed. 906

The essential elements of the offense of sabotage under the basic sabotage statute,[1] relating to the destruction of war material, war premises, or war utilities when the United States is at war or in times of national emergency, are the following:[2]

(1) the defendant must have willfully injured, destroyed, contaminated, or infected, or must have willfully attempted to injure, destroy, contaminate, or infect, any war material, war premises, or war utilities;

(2) the defendant must have committed any of the above-described acts either (a) with an intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on a war or defense activities or (b) with reason to believe that his or her act might injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on a war or defense activity; and

(3) the defendant must have committed any of the acts described above at such a time as to come within the application of the statute.

It was reversible error to classify the crime of willfully destroying government war material as consisting of only two elements, being the act of attempting to destroy war material during a national emergency, and doing such act with the requisite willfulness and intent.[3]

Observation:

To support a conviction for violating the peacetime provision of the Sabotage Act,[4] the government must establish an injury or interference with the national defense[5] by showing that the defendant's actions were either consciously meant or practically certain to impair the nation's capacity to wage war or defend against attack.[6]

Damage to government property, or a particular quantum of damage, is not an essential element of the offense.[7] The basic sabotage statute[8] proscribes unsuccessful attempts as well as the completed offense and covers situations in which no damage results from the accused's activities.[9]

Footnotes

1 18 U.S.C.A. § 2153(a).

2 U.S. v. Eisenberg, 469 F.2d 156 (8th Cir. 1972); U.S. v. Achtenberg, 459 F.2d 91, 24 A.L.R. Fed. 891 (8th Cir. 1972).

3 U.S. v. Achtenberg, 459 F.2d 91, 24 A.L.R. Fed. 891 (8th Cir. 1972).

4 18 U.S.C.A. § 2155(a).

5 U.S. v. Walli, 785 F.3d 1080 (6th Cir. 2015).

6 U.S. v. Walli, 785 F.3d 1080 (6th Cir. 2015).

7 U.S. v. Achtenberg, 459 F.2d 91, 24 A.L.R. Fed. 891 (8th Cir. 1972).

8 18 U.S.C.A. § 2153(a).

9 U.S. v. Achtenberg, 459 F.2d 91, 24 A.L.R. Fed. 891 (8th Cir. 1972).

70 Am. Jur. 2d Sedition, Etc. § 47

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2. Elements of Offense

§ 47. Willfulness, intent, or reason to believe

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, War and National Emergency 1126

The sabotage statutes include scienter elements.[1] In order to be found guilty, the accused must have intended to interfere with or injure the national defense.[2] The scienter element of the offense defined in the statute regarding the destruction of war material[3] consists of two alternate elements, one requiring proof of acts undertaken "with intent to injure" and the other requiring proof of acts undertaken "with reason to believe that his or her act may injure."[4] For example, the specific intent to injure or interfere with the war effort of the United States or an ally need not be proved, where the offense is the act of willfully making war material in a defective manner, since the act done with reason to believe that it may injure or interfere with governmental war measures constitutes the offense.[5]

Observation:

The evidence was sufficient to establish that the defendants intended to interfere with the national defense of the United States as required to support defendants' convictions for willful injury of national defense premises with intent to harm the national defense[6] where the defendants used bolt-cutters to cut through four fences to access a United States nuclear facility that they knew stored enriched uranium and where the fences displayed "no trespassing" signs which also stated that entering the facility was a federal crime.[7] It could be inferred from such actions that the defendants knew that their conduct would cause a disruption or interference at the facility.[8]

Footnotes

1 18 U.S.C.A. §§ 2152, 2153(a), 2154(a), 2155(a), 2156(a).

2 U.S. v. Melville, 309 F. Supp. 774 (S.D. N.Y. 1970).

3 18 U.S.C.A. § 2153(a).

4 U.S. v. Achtenberg, 459 F.2d 91, 24 A.L.R. Fed. 891 (8th Cir. 1972).

5 Schmeller v. U. S., 143 F.2d 544 (C.C.A. 6th Cir. 1944).

6 18 U.S.C.A. § 2155(a).

7 U.S. v. Walli, 976 F. Supp. 2d 998 (E.D. Tenn. 2013).

8 U.S. v. Walli, 976 F. Supp. 2d 998 (E.D. Tenn. 2013).

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3. Procedure

§ 48. Jurisdiction

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, War and National Emergency 1126

Persons who enter the United States surreptitiously in time of war to commit sabotage may be subject to the jurisdiction of military tribunals.[1]

Footnotes

1 Ex parte Quirin, 317 U.S. 1, 63 S. Ct. 2, 87 L. Ed. 3 (1942), order modified on other grounds, 63 S. Ct. 22 (1942).

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3. Procedure

§ 49. Jury instructions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, War and National Emergency 1126

Forms

Forms relating to espionage prosecutions, see Federal Procedural Forms, Armed Forces, Civil Disturbances, and National Defense[Westlaw®(r) Search Query]

Instructions to the jury in a prosecution for sabotage must fully identify and explain the elements of the offense, explaining each element individually and advising the jury of the burden of the government to prove each element beyond a reasonable doubt.[1] An instruction which fails to separately charge the elements and identify and explain each separately, with sufficient clarity to permit the jury to perform its duty intelligently, is reversible error.[2]

It is error for an instruction charging the jury on the offense of sabotage to include the words "and others" following the defendant's name, where that could mislead the jury into believing that the defendant would be held responsible for the acts of others, when in fact the prosecution had not charged the defendant's participation in a conspiracy or joint responsibility with others.[3] Similarly, where the indictment charges the intent element of the offense as the defendant having acted "with reason to believe that his or her act may injure," it is error to instruct the jury with regard to the accused's "intent to injure" since the two are alternate elements of the offense and contemplate distinct cognitive states.[4]

Even if defendants being prosecuted for destruction of national defense material, premises, or utilities believe that the threat to use nuclear missiles constitutes a war crime justifying their conduct, a jury instruction for a good-faith mistake-of-law is not warranted if the defendants fail to demonstrate how their misunderstanding of the law negated that they had willfully interfered with national defense.[5]

Footnotes

1 U.S. v. Achtenberg, 459 F.2d 91, 24 A.L.R. Fed. 891 (8th Cir. 1972).

2 U.S. v. Achtenberg, 459 F.2d 91, 24 A.L.R. Fed. 891 (8th Cir. 1972).

3 U.S. v. Achtenberg, 459 F.2d 91, 24 A.L.R. Fed. 891 (8th Cir. 1972).

4 U.S. v. Achtenberg, 459 F.2d 91, 24 A.L.R. Fed. 891 (8th Cir. 1972).

5 U.S. v. Platte, 401 F.3d 1176 (10th Cir. 2005).

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A.L.R. Index, Freedom of Speech and Press
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West's A.L.R. Digest, Insurrection and Sedition 1, 2

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1. In General

§ 50. Power to regulate subversive activities

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 2

The legislature has the power to punish subversive action,[1] and the Federal Bureau of Investigation has a responsibility to investigate subversive acts.[2] However, the mere expression of views embodying a philosophy of violence and disruption does not justify a denial of First Amendment rights to those expressing such views,[3] including the teaching of Communist theory and the moral propriety or necessity for resort to force and violence, in the absence of a call to violence now or in the future.[4] The government may not impose criminal sanctions or deny rights and privileges solely because of a citizen's association with an unpopular organization.[5] A statute which imposes civil disabilities on members of a named organization constitutes a bill of attainder if the disabilities bear no rational relation to the purpose of the legislation.[6] Before it can impose such disabilities, the government has the burden of proving an individual's knowing affiliation with an organization possessing unlawful aims and goals and a specific intent to further those illegal aims.[7]

Caution:

Much of the Subversive Activities Control Act[8] has been repealed[9] and its remaining sections[10] are discussed elsewhere.[11]

Footnotes

1 Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94, 73 S. Ct. 143, 97 L. Ed. 120 (1952).
As to congressional authority to conduct investigations, see Am. Jur. 2d, United States §§ 1 et seq.

2 5 U.S.C.A. § 1304(g).

3 Healy v. James, 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972).
For a general discussion of freedom of speech as a First Amendment right, see Am. Jur. 2d, Constitutional Law[Westlaw®(r): Search Query].

4 Noto v. U.S., 367 U.S. 290, 81 S. Ct. 1517, 6 L. Ed. 2d 836 (1961).

5 Healy v. James, 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972).
The mere presence of an individual's name on a Communist-action organization's membership rolls is insufficient to impute to the person the organization's illegal goals. U.S. v. Robel, 389 U.S. 258, 88 S. Ct. 419, 19 L. Ed. 2d 508 (1967).

6 U.S. v. Brown, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965).
As to whether acts regulating subversive organizations and prohibiting conduct by their members are bills of attainder, see Am. Jur. 2d, Constitutional Law[Westlaw®(r): Search Query].

7 Healy v. James, 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972).

8 Former 18 U.S.C.A §§ 781 to 798.

9 Pub. L. No. 103-199, Title VIII, § 803(1), 107 Stat. 2329.

10 50 U.S.C.A. §§ 783, 796, 797; 18 U.S.C.A. § 1507.

11 §§ 15, 16, 22, 33, 36.

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70 Am. Jur. 2d Sedition, Etc. § 51

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1. In General

§ 51. Definitions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 2

"Subversive activities" have been defined as the activities of persons or organizations who advocate the overthrow of the government by unlawful means.[1] A statutory definition of a "subversive organization" as one which engages in or advocates, abets, or teaches activities intended to overthrow the constitutional form of a state's government is unconstitutionally vague.[2]

Footnotes

1 Adler v. Board of Education of City of New York, 342 U.S. 485, 72 S. Ct. 380, 96 L. Ed. 517, 27 A.L.R.2d 472 (1952) (overruled in part on other grounds by, Keyishian v. Board of Regents of University of State of N. Y., 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967)).

2 Dombrowski v. Pfister, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965).

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70 Am. Jur. 2d Sedition, Etc. § 52

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1. In General

§ 52. Registration of agents

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 2

A federal statute provides that, with certain exceptions, every person who has knowledge of, or who has received instruction or assignment in, the espionage, counterespionage, or sabotage service or tactics of a foreign government or foreign political party, must register with the Attorney General.[1] Violation of this provision may result in a fine or imprisonment,[2] and, in the case of an alien, in deportation.[3] Compliance with this registration statute does not relieve any person from compliance with any other applicable registration statute.[4]

Footnotes

1 50 U.S.C.A. § 851.
As to exemptions from requirements of registration, see § 53.

2 50 U.S.C.A. § 855(a).

3 50 U.S.C.A. § 855(b).

4 50 U.S.C.A. § 857.
As to the provisions of the Foreign Agents Registration Act which require agents of foreign principals to file a registration statement with the Attorney General and to file copies of political propaganda, see Am. Jur. 2d, Lobbying[Westlaw®(r): Search Query].

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70 Am. Jur. 2d Sedition, Etc. § 53

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1. In General

§ 53. Registration of agents—Exemptions from requirements

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 2

Exempt from the agent registration statements are persons who:

- have obtained knowledge in the espionage, counterespionage, or sabotage service of a foreign government or foreign political party by reason of civilian, military, or police employment with the United States government or the governments of its political subdivisions[1]
- have obtained such knowledge solely by reason of academic or personal interest[2]
- have made full disclosure of such knowledge to government intelligence officials[3]
- are duly accredited diplomatic or consular officers of a foreign government or who are officials of a foreign government co-operating with the United States in intelligence matters[4]

Footnotes

1 50 U.S.C.A. § 852(a).

2 50 U.S.C.A. § 852(b).

3 50 U.S.C.A. § 852(c).
Also exempt are persons whose knowledge is a matter of record in the files of a United States government agency and concerning whom a determination is made by the Attorney General or the Director of Central Intelligence that registration would not be in the interest of national security. 50 U.S.C.A. § 852(d).

4 50 U.S.C.A. § 852(e) to (j).

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2. Smith Act

§ 54. Terms, construction, and constitutionality

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 2

Definition:

The term "organize," as used in the Smith Act provision making it unlawful to help organize a group which has as its purpose the overthrow of the government, refers only to acts entering into the creation of a new organization, and not to acts thereafter performed in carrying on its activities, even though such acts may loosely be termed "organizational."[1]

The Smith Act[2] makes it a crime to:

- knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or of any state or political subdivision, by force, violence, or the assassination of any government officer
- with intent to cause the overthrow or destruction of the government, print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempt to do so

• organize or help or attempt to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence, or become or be a member of, or affiliate with, any such society, group, or assembly of persons, knowing its purposes

The Smith Act is aimed at the advocacy and teaching of concrete action for the forcible overthrow of the government and not at advocacy of principles divorced from action.[3] The essential distinction is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something.[4]

Caution:

The Smith Act does not inherently, or as applied to leaders of the Communist Party, violate the guaranties of free speech, free press, and free association under the First Amendment, nor is it unconstitutional on the ground of indefiniteness.[5] However, the United States Supreme Court has indicated that a reviewing court must pay special heed to the demands of the First Amendment when marking out the boundaries of speech under the Smith Act.[6]

Footnotes

1 Yates v. U. S., 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957) (overruled on other grounds by, Burks v. U.S., 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)).

2 18 U.S.C.A. § 2385.

3 Yates v. U. S., 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957) (overruled on other grounds by, Burks v. U.S., 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)).
The "advocacy" of the accused must be of a kind calculated to incite persons and must be advocacy of action as distinguished from mere advocacy of an abstract doctrine. Wellman v. U.S., 253 F.2d 601 (6th Cir. 1958).

4 Scales v. U.S., 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed. 2d 782 (1961).

5 Scales v. U.S., 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed. 2d 782 (1961).
As to freedom of association, generally, see Am. Jur. 2d, Constitutional Law[Westlaw®(r): Search Query].

6 U.S. v. Dennis, 183 F.2d 201 (2d Cir. 1950), judgment aff'd, 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951).

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2. Smith Act

§ 55. Membership clause

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 2

The membership clause of the Smith Act[1] makes it a felony to acquire or hold a knowing membership in any organization which advocates the overthrow of the government by force or violence, but the clause reaches only active, and not mere nominal or passive, members.[2] Present advocacy of forceful overthrow of the government, and not an intent to advocate it in the future or a conspiracy to advocate it in the future, is an element of the offense.[3]

Observation:

The United States Supreme Court will rarely review the general sufficiency of the evidence to support a criminal conviction, but it will do so upon the first review of convictions under the membership clause of the Smith Act to make sure that the substantive constitutional standards have not been thwarted and to provide future guidance to the lower courts in an area which borders closely upon constitutionally protected rights.[4]

Footnotes

1 18 U.S.C.A. § 2385.

2 Scales v. U.S., 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed. 2d 782 (1961).

3 Noto v. U.S., 367 U.S. 290, 81 S. Ct. 1517, 6 L. Ed. 2d 836 (1961).

4 Scales v. U.S., 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed. 2d 782 (1961).

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2. Smith Act

§ 56. Conspiracy

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 2

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The Smith Act specifically proscribes conspiracies by two or more persons to violate its provisions.[1] An agreement to advocate the forcible overthrow of the government, however, is not an unlawful conspiracy under the Smith Act in the absence of a call for advocacy of action to that end.[2] A conspiracy is proved only if the government can show a conspiracy to teach people to take concrete action toward the violent overthrow of the government as soon as possible.[3] It is not necessary that advocacy of "present violent action" be proved to sustain a conviction.[4]

Persons may be convicted both of the substantive offense under the Smith Act and of conspiracy to commit the crime, and the fact that defendants were guilty, under the Smith Act, of organizing a party which had as its purpose the overthrow of the government does not preclude the government from prosecuting them for conspiracy.[5]

Footnotes

1 18 U.S.C.A. § 2385.

2 Yates v. U. S., 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957) (overruled on other grounds by, Burks v. U.S., 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)).

3 U.S. v. Kuzma, 249 F.2d 619 (3d Cir. 1957).

4 Yates v. U. S., 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957) (overruled on other grounds by, Burks v. U.S., 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)).

A conspiracy to advocate the overthrow of the government, as distinguished from the advocacy itself, can be constitutionally restrained even though it comprises only preparation. Dennis v. United States, 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951).

5 Frankfeld v. U.S., 198 F.2d 679 (4th Cir. 1952).

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2. Smith Act

§ 57. Punishment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 2

The punishment prescribed for violations of the Smith Act, whether for advocating violent overthrow of the United States Government or a conspiracy to the same end, is a fine, or imprisonment, or both, and ineligibility for employment by the United States for a period of years after conviction.[1]

Footnotes

1 18 U.S.C.A. § 2385.

70 Am. Jur. 2d Sedition, Etc. § 58

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3. Communist Control Act

§ 58. Provisions of Act, generally

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West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 2

The Communist Control Act of 1954[1] declares that the Communist Party of the United States is an instrumentality of a conspiracy to overthrow the government of the United States and states that its role as the agency of a hostile foreign power renders its existence a clear, present, and continuing danger to the security of the United States.[2] For these reasons, the Act declares that the party should be outlawed.[3] The Act then undertakes to accomplish its stated purpose by barring the Communist Party from the political process.[4] To that end, it provides that the Communist Party of the United States is not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof.[5]

Caution:

These two provisions of the Communist Control Act[6] have been held unconstitutional on their face as bills of attainder—punishing an identified group and not identified activities—and the provisions have also been held violative of the Due Process and Equal Protection Clauses of the Constitution.[7]

The Communist Control Act does not repeal the Smith Act,[8] which deals with direct promotion of treason and sedition.[9]

Footnotes

1 50 U.S.C.A. §§ 841 to 844.

2 50 U.S.C.A. § 841.

3 50 U.S.C.A. § 841.

4 Blawis v. Bolin, 358 F. Supp. 349 (D. Ariz. 1973).

5 50 U.S.C.A. § 842.

6 50 U.S.C.A. §§ 841, 842.

7 Blawis v. Bolin, 358 F. Supp. 349 (D. Ariz. 1973).
In an earlier case, it was held that a candidate for public office could be barred from running under the Communist Party banner under this law. Salwen v. Rees, 16 N.J. 216, 108 A.2d 265 (1954).
As to whether acts regulating subversive organizations and prohibiting conduct by their members are bills of attainder, see Am. Jur. 2d, Constitutional Law[Westlaw®(r): Search Query].

8 18 U.S.C.A. § 2385.
As to Smith Act, see §§ 54 to 57.

9 U.S. v. Silverman, 132 F. Supp. 820 (D. Conn. 1955); U.S. v. Brandt, 139 F. Supp. 367 (N.D. Ohio 1955).

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1. In General

§ 59. Constitutional and statutory provisions

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West's Key Number Digest

West's Key Number Digest, Treason 2

Definition:

Treason is generally defined as a breach of allegiance[1] to a government committed by a person who owes allegiance to it and is the greatest crime known to the law.[2] "Treason" has also been defined as the offense of attempting by overt acts to overthrow the government of a state to which the offender owes allegiance or of betraying the state into the hands of a foreign power.[3] While one who is convicted of treason is usually referred to as a traitor, the word "traitor" is a broad, loose, and general term applied to one who, without authority, transmits information concerning the national defense and is not necessarily used to connote the technical treasonous act defined in the Constitution.[4]

The United States Constitution declares that treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.[5] The general federal statute defining treason provides that whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort, within the United States or elsewhere, is guilty of the offense.[6] However, the words "owing allegiance to the United States" used in this statute add nothing to the meaning of the offense as defined in the Constitution as these words do not in any degree affect the sense of the constitutional definition of treason.[7] Congress cannot restrict or enlarge the constitutional definition of treason.[8]

Observation:

The definitive provisions were inserted into the Constitution in order to prevent the possibility of the extension of treason to offenses of minor importance.[9]

The crime of treason as defined in the United States Constitution is not to be extended by construction to doubtful cases.[10] Crimes not clearly within the constitutional definition must receive such punishment as the legislature may in its wisdom provide.[11]

The offense of entering or remaining with hostile purpose upon the territory of the United States in time of war, without uniform or other appropriate means of identification, is, even when committed by a citizen, distinct from the crime of treason defined in the United States Constitution since the absence of uniform essential to the one is irrelevant to the other.[12]

Footnotes

1 U.S. v. Wiltberger, 18 U.S. 76, 5 L. Ed. 37, 1820 WL 2133 (1820); State v. Wilson, 80 Vt. 249, 67 A. 533 (1907).

2 Stephan v. U.S., 133 F.2d 87 (C.C.A. 6th Cir. 1943); State v. Wilson, 80 Vt. 249, 67 A. 533 (1907).
As to treason constituting an offense against a state government, see § 86.

3 U.S. v. Helmich, 521 F. Supp. 1246 (M.D. Fla. 1981), judgment aff'd, 704 F.2d 547 (11th Cir. 1983).

4 U.S. v. Drummond, 354 F.2d 132 (2d Cir. 1965).

5 U.S. Const. Art. III, § 3.

6 18 U.S.C.A. § 2381.

7 U.S. v. Wiltberger, 18 U.S. 76, 5 L. Ed. 37, 1820 WL 2133 (1820).

8 Stephan v. U.S., 133 F.2d 87 (C.C.A. 6th Cir. 1943).

9 Ex parte Bollman, 8 U.S. 75, 2 L. Ed. 554, 1807 WL 1261 (1807).

10 Ex parte Bollman, 8 U.S. 75, 2 L. Ed. 554, 1807 WL 1261 (1807).

11 Ex parte Bollman, 8 U.S. 75, 2 L. Ed. 554, 1807 WL 1261 (1807).
The constitutional definition of treason leaves no room for constructive treason. Stephan v. U.S., 133 F.2d 87 (C.C.A. 6th Cir. 1943).

12 Ex parte Quirin, 317 U.S. 1, 63 S. Ct. 2, 87 L. Ed. 3 (1942), order modified on other grounds, 63 S. Ct. 22 (1942).

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1. In General

§ 60. Extraterritorial application

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West's Key Number Digest

West's Key Number Digest, Treason 1

Congress has the power to punish treason committed abroad.[1] The treasonable act of adherence to the enemy, and treasonable intent, go with the perpetrator wherever he or she is.[2] The usual presumption against extraterritorial application of the criminal law does not apply to treason as while the purpose of a criminal statute ordinarily is to protect the domestic order—not to reach across national boundaries to take hold of persons within the jurisdiction of another nation—treason is directed against the existence of the nation and by its nature consists of conduct which might ordinarily be exerted from without in aid of the enemy who is outside the national borders.[3]

Footnotes

1 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).
An American citizen who broadcasts radio programs from an enemy nation during war for the purpose of lowering the morale of members of the American Armed Forces may be guilty of treason. Iva Ikuko Toguri D'Aquino v. U. S., 192 F.2d 338 (9th Cir. 1951).

2 Gillars v. U.S., 182 F.2d 962 (D.C. Cir. 1950).

3 Gillars v. U.S., 182 F.2d 962 (D.C. Cir. 1950).

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1. In General

§ 61. Misprision of treason and other related offenses

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West's Key Number Digest

West's Key Number Digest, Treason 1, 8

Conduct which is not equivalent to treason as defined in the Treason Clause may be otherwise proscribed by Congress.[1] Congress has the power to provide punishment for acts which have not ripened into treason or which are related to, but do not fall within the meaning of, treason as defined in the Constitution.[2] Thus, Congress has provided for the punishment of, and defined, misprision of treason, declaring that "whoever, owing allegiance to the United States and having knowledge of the commission of any treason against them, conceals and does not, as soon as may be, disclose and make known the same to the President or to some judge of the United States, or to the governor or to some judge or justice of a particular state, is guilty of misprision of treason."[3] Congress also provides punishment for those who incite or engage in any rebellion or insurrection against the authority of the United States or the laws thereof[4] or who commit acts of espionage[5] or sabotage.[6]

Footnotes

1 U.S. v. Kim, 808 F. Supp. 2d 44 (D.D.C. 2011).
An indictment does not violate the Treason Clause where the offenses for which the defendant is convicted do not include allegiance to the United States as an element. U.S. v. Augustin, 661 F.3d 1105, 86 Fed. R. Evid. Serv. 1275 (11th Cir. 2011).

2 Ex parte Bollman, 8 U.S. 75, 2 L. Ed. 554, 1807 WL 1261 (1807).

3 18 U.S.C.A. § 2382.

4 Am. Jur. 2d, Insurrection § 2.

5 §§ 14 to 39.

6 §§ 40 to 49.

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1. In General

§ 62. Punishment

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West's Key Number Digest

West's Key Number Digest, Treason 1

The United States Constitution empowers Congress to fix the punishment for treason.[1] The penalty prescribed upon a conviction of treason is death or imprisonment and a fine.[2] Every person convicted of treason is declared incapable of holding any federal office.[3] The statute fixing the penalty for treason at death permits the court, in its discretion, to impose a sentence of imprisonment.[4]

The punishment provided for commission of misprision of treason is imprisonment and a fine.[5]

Footnotes

1 U.S. Const. Art. III, § 3, cl. 2.
2 18 U.S.C.A. § 2381.
3 18 U.S.C.A. § 2381.
4 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).
5 18 U.S.C.A. § 2382.

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2. Elements of Offense

§ 63. Elements under constitution

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West's Key Number Digest

West's Key Number Digest, Treason 1

Under the constitutional definition of treason,[1] a person can be convicted of the crime only if the person is guilty of levying war against the United States[2] or if the person adheres to the enemies of the United States, giving them aid and comfort.[3] No conviction can be had unless the accused participates in some overt act[4] which is accompanied by a treasonable intent.[5]

Treason also includes in its elements a breach of allegiance to the United States.[6]

Footnotes

1 U.S. Const. Art. III, § 3.
2 § 66.
3 § 67.
4 § 65.
5 § 64.
6 U.S. v. Rahman, 189 F.3d 88, 52 Fed. R. Evid. Serv. 425 (2d Cir. 1999).

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2. Elements of Offense

§ 64. Intent

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treason 3

Intent is a necessary element of the crime of treason.[1] The intent sufficient to sustain a conviction of treason must be an intent, not merely to commit the overt acts of which the defendant stands accused but to betray the country by means of such acts.[2] Mere negligent or undesigned acts will not sustain a conviction of treason.[3]

One accused of treason is presumed to have intended the natural consequences which one standing in his or her circumstances and possessing his or her knowledge would reasonably expect to result from the person's acts.[4] Thus, one who deals with known enemy agents in time of war and intentionally gives them aid in executing their hostile mission is guilty of treason regardless of motive.[5]

Proof that a citizen gave aid and comfort to the enemy[6] may in itself be sufficient under some circumstances to establish the citizen's disloyal and treasonable intent in adhering to the enemy.[7] However, where the overt acts relied on to sustain a conviction of treason are trivial and commonplace, so as to make it doubtful as to whether the defendants actually gave aid and comfort to the enemy, the necessary treacherous intent must be mainly found in other evidence.[8]

Footnotes

1 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952); Cramer v. U.S., 325 U.S. 1, 65 S. Ct. 918, 89 L. Ed. 1441 (1945).

2 Cramer v. U.S., 325 U.S. 1, 65 S. Ct. 918, 89 L. Ed. 1441 (1945).
An intent to give aid and comfort to the enemy is an essential element of the crime of treason. Stephan v. U.S., 133 F.2d 87 (C.C.A. 6th Cir. 1943).

3 Cramer v. U.S., 325 U.S. 1, 65 S. Ct. 918, 89 L. Ed. 1441 (1945).

4 Cramer v. U.S., 325 U.S. 1, 65 S. Ct. 918, 89 L. Ed. 1441 (1945).

5 Best v. U.S., 184 F.2d 131 (1st Cir. 1950).

6 As to "aid and comfort" as a necessary element of treason, see § 67.

7 Cramer v. U.S., 325 U.S. 1, 65 S. Ct. 918, 89 L. Ed. 1441 (1945).
Intent to betray, as an element of treason, is sufficiently shown by defendant's statements deriding the American and praising the enemy's war effort and professing loyalty to the enemy. Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).

8 Haupt v. U.S., 330 U.S. 631, 67 S. Ct. 874, 91 L. Ed. 1145 (1947); Cramer v. U.S., 325 U.S. 1, 65 S. Ct. 918, 89 L. Ed. 1441 (1945).
As to "overt act" as an element of the crime of treason, see § 65.

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§ 65. Overt act

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West's Key Number Digest

West's Key Number Digest, Treason 1

A.L.R. Library

Accused's right to, and prosecution's privilege against, disclosure of identity of informer, 76 A.L.R.2d 262

The United States Constitution provides that no person shall be convicted of treason unless on the testimony of two witnesses to the same "overt act" or on confession in open court.[1] Although there is some authority that an overt act is not an essential element of the crime of treason,[2] the better view seems to be that an overt act in manifestation of a treasonable intent[3] is necessary to sustain a conviction for treason.[4] While it is essential to the crime of treason that an overt act be committed with the intent to betray the United States, the overt act need not constitute a crime in itself in order to warrant conviction for treason.[5] The very minimum function of an overt act in a treason prosecution is to show sufficient action by the accused to sustain a finding that the accused actually gave aid and comfort to the enemy.[6] A sufficient measure of an overt act of treason is whether it tends to give the enemy the heart and courage to go on with the war.[7]

Treason may not be found on the basis of mere mutterings of discontent, or relatively innocuous opposition,[8] nor by the mere utterance of disloyal sentiments.[9] However, words may be an integral part of the commission of the crime of treason if the elements which constitute treason are present, namely, if there is adherence to, and the giving of aid and comfort to, the enemy,

by an overt act proved by two witnesses, with intention to betray, though the overt act is committed through speech.[10] The communication of an idea, whether by speech or writing, is as much an act as throwing a brick, and one may commit treason by conveying military intelligence to the enemy though the only overt act is the speaking of words.[11] Thus, radio broadcasting,[12] as well as the use of the printed word, or the sending of wireless messages,[13] can constitute an overt act to support a conviction of treason.[14]

Footnotes

1 U.S. Const. Art. III, § 3.
As to the two-witness rule, see § 72.

2 U.S. v. Haupt, 136 F.2d 661 (C.C.A. 7th Cir. 1943).

3 As to the necessity for intent, see § 64.

4 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952); Chandler v. U.S., 171 F.2d 921 (1st Cir. 1948); Iva Ikuko Toguri D'Aquino v. U. S., 192 F.2d 338 (9th Cir. 1951).

5 Iva Ikuko Toguri D'Aquino v. U. S., 192 F.2d 338 (9th Cir. 1951).

6 Haupt v. U.S., 330 U.S. 631, 67 S. Ct. 874, 91 L. Ed. 1145 (1947); Cramer v. U.S., 325 U.S. 1, 65 S. Ct. 918, 89 L. Ed. 1441 (1945).
Overt acts of treason committed by an American citizen, who is also a citizen of Japan under Japanese law, while he was employed as an interpreter in Japan during World War II, are properly proved, where each of these acts related to his cruel treatment of American prisoners at a camp. Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).

7 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).

8 U.S. v. Rahman, 189 F.3d 88, 52 Fed. R. Evid. Serv. 425 (2d Cir. 1999).

9 Chandler v. U.S., 171 F.2d 921 (1st Cir. 1948).

10 Gillars v. U.S., 182 F.2d 962 (D.C. Cir. 1950).

11 Chandler v. U.S., 171 F.2d 921 (1st Cir. 1948).

12 Chandler v. U.S., 171 F.2d 921 (1st Cir. 1948); Burgman v. U.S., 188 F.2d 637 (D.C. Cir. 1951); Gillars v. U.S., 182 F.2d 962 (D.C. Cir. 1950).

13 U.S. v. Werner, 247 F. 708 (E.D. Pa. 1918).

14 Chandler v. U.S., 171 F.2d 921 (1st Cir. 1948).

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§ 66. Levying war

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West's Key Number Digest

West's Key Number Digest, Treason 5

To constitute the specific crime of levying war against the United States within the meaning of the constitutional provision defining treason,[1] war must be actually levied against the United States although this does not mean that there must be a formal or declared war. The words "levying war" have been interpreted to include not only the act of making war for the purpose of entirely overturning the government but also any combination forcibly to oppose the execution of any public law of the United States if accompanied or followed by an act of forcible opposition to such law in pursuance of the combination.[2] There must, however, be an actual assemblage of persons for the purpose of executing a treasonable design, and a mere conspiracy for this act or the enlistment of persons to effect it without assembling them is not actual levying of war.[3]

It is not necessary that a whole army should assemble or that the various parts which are to compose it should have combined.[4] If there is an actual assemblage of persons for the purpose of opposing the government, it is not material that the force is inadequate to accomplish the proposed design or that the particular person charged has not actually borne arms.[5] If war is actually levied, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.[6]

Distinctions:

Conspiring to subvert by force the government of the country is not treason, though it may constitute a separate crime,[7] since to conspire to levy war and to actually levy war are distinct offenses.[8]

An insurrection by armed men to prevent, by force and intimidation, the execution of an act of Congress is high treason by levying war.[9] However, an insurrection of a private nature, not having for its object the subversion of government or resistance to federal laws, will not amount to levying war[10] although it may be punishable as insurrection.[11]

Footnotes

1 U.S. Const. Art. III, § 3.
As to constitutional and statutory provisions relating to treason, see § 59.

2 Druecker v. Salomon, 21 Wis. 621, 1867 WL 1729 (1867).

3 Ex parte Bollman, 8 U.S. 75, 2 L. Ed. 554, 1807 WL 1261 (1807).

4 Ex parte Bollman, 8 U.S. 75, 2 L. Ed. 554, 1807 WL 1261 (1807).

5 Ex parte Bollman, 8 U.S. 75, 2 L. Ed. 554, 1807 WL 1261 (1807).

6 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952); Ex parte Bollman, 8 U.S. 75, 2 L. Ed. 554, 1807 WL 1261 (1807).

7 §§ 50 to 58.

8 Ex parte Bollman, 8 U.S. 75, 2 L. Ed. 554, 1807 WL 1261 (1807).

9 U S v. Mitchell, 2 U.S. 348, 2 Dall. 348, 26 F. Cas. 1277, No. 15788, 1 L. Ed. 410 (C.C.D. Pa. 1795).

10 U S v. Hanway, 26 F. Cas. 105, No. 15299 (C.C.E.D. Pa. 1851).

11 Am. Jur. 2d, Insurrection § 2.

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§ 67. Adhering to enemies; giving aid and comfort

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treason 6

Definition:

The term "aid and comfort" as used in the provision of the United States Constitution dealing with treason[1] contemplates some kind of affirmative action, deed, or physical activity tending to strengthen the enemy or weaken the power to resist the enemy and is not satisfied by a mere mental operation.[2] The term "enemies" within the meaning of this clause means the subjects of a foreign power in open hostility with the United States.[3]

Treason against the United States consists in levying war against the United States or "in adhering to their enemies, giving them aid and comfort."[4] "Adhering to the enemy" is established by evidence showing that the defendant committed treasonable acts willingly and voluntarily and not because of any coercion.[5] "Aid and comfort" are given whenever overt acts[6] are committed which, in their natural consequence, if successful, would encourage and advance the interests of the enemy.[7]

Observation:

In determining whether an act is treasonable, it is not decisive whether the contribution to the enemy's war effort is only minor and not crucial.[8] It is the nature of the act that is important.[9] The act may be unnecessary to a successful completion of the enemy's project; it may be an abortive attempt.[10] It may in the sum total of the enemy's effort be a casual and unimportant step.[11] However, if it gives aid and comfort to the enemy at the immediate moment of its performance, it qualifies as an overt act within the constitutional standard of treason.[12]

To be guilty of treason one must be guilty of both elements, that is, of adhering to the enemies of the United States and of giving them aid and comfort.[13] The mere utterance of disloyal sentiment is not treason if aid and comfort is not given to the enemy.[14] However, speaking into a microphone in a recording studio of an enemy nation, and causing a record to be made that is to be used as enemy propaganda, have been held to constitute "aid and comfort."[15] Other acts which have been held to give aid and comfort to the enemy are assisting a spy[16] and committing acts of cruelty against American war prisoners in an enemy country.[17]

Footnotes

1 U.S. Const. Art. III, § 3.

2 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952); Cramer v. U.S., 325 U.S. 1, 65 S. Ct. 918, 89 L. Ed. 1441 (1945).

3 Stephan v. U.S., 133 F.2d 87 (C.C.A. 6th Cir. 1943).

4 U.S. Const. Art. III, § 3.

5 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).

6 As to overt acts as necessary elements of the crime of treason, see § 65.

7 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).

8 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).

9 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).

10 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).

11 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).

12 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).

13 Cramer v. U.S., 325 U.S. 1, 65 S. Ct. 918, 89 L. Ed. 1441 (1945); Gillars v. U.S., 182 F.2d 962 (D.C. Cir. 1950).
One may adhere to the enemy, that is, one may think disloyal thoughts and have his or her heart on the side of the enemy, yet if the person commits no act giving aid and comfort to the enemy, the person is not guilty of treason. Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).

14 Chandler v. U.S., 171 F.2d 921 (1st Cir. 1948).

15 Gillars v. U.S., 182 F.2d 962 (D.C. Cir. 1950).
The acts of a United States national who, for the duration of World War II, acted as a paid propagandist for Germany and who broadcast from Berlin speeches over radio to the United States in an effort to undermine the morale of United States citizens constituted treason rather than free speech. Chandler v. U.S., 171 F.2d 921 (1st Cir. 1948).

16 Haupt v. U.S., 330 U.S. 631, 67 S. Ct. 874, 91 L. Ed. 1145 (1947).

17 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).

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3. Persons Who May Commit Offense

§ 68. Persons subject to treason conviction, generally

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West's Key Number Digest

West's Key Number Digest, Treason 10

Treason is a breach of allegiance and can be committed only by one who owes allegiance, either perpetual or temporary, to the United States.[1] The obligation of allegiance inheres in citizenship and if the accused is shown to be a citizen at the time of the alleged crime, the obligation of allegiance is sufficiently proved.[2] A citizen does not cease to owe allegiance within the meaning of the treason statute by swearing allegiance to another nation at a time when a state of war did not yet exist between the United States and that nation.[3]

The fact that one is situated in a foreign country and deprived of protection due from the United States as the country of his or her citizenship does not relieve the person of all duty of allegiance to the United States, and such person may be convicted of treason for acts performed during such period.[4] Treason may be committed by an American with dual nationality while residing in another country which claims him or her as a national.[5]

Treason may be committed by a minor who has reached an age of discretion and is capable of committing crime.[6]

Footnotes

1 Young v. U.S., 97 U.S. 39, 24 L. Ed. 992, 1877 WL 18589 (1877); U.S. v. Wiltberger, 18 U.S. 76, 5 L. Ed. 37, 1820 WL 2133 (1820).

2 Gillars v. U.S., 182 F.2d 962 (D.C. Cir. 1950).
As to aliens who may owe temporary allegiance to the United States, see § 69.

3 Gillars v. U.S., 182 F.2d 962 (D.C. Cir. 1950).

4 Burgman v. U.S., 188 F.2d 637 (D.C. Cir. 1951).

While local allegiance, that is, obedience to the law of the country of domicil or residence, is permissible, this kind of allegiance does not call for adherence to the enemy and the giving of aid and comfort to it with disloyal intent. Gillars v. U.S., 182 F.2d 962 (D.C. Cir. 1950).

As to the extraterritorial reach of the treason statute, see § 60.

5 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).

6 Boyd v. Banta, 1 N.J.L. 266, 1795 WL 570 (N.J. 1795) (19-year-old).

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§ 69. Aliens

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West's Key Number Digest

West's Key Number Digest, Treason 10

An alien, while domiciled in a country, owes a local and temporary allegiance which continues during the period of his or her residence.[1] If an alien, while residing in a foreign country, does any act which would amount to treason if committed by a citizen of that country, he or she will be guilty of treason, for while the alien is thus a resident, even though only temporarily, he or she owes allegiance to the government.[2]

It has been indicated that one who is not an American citizen and does not owe allegiance to the United States cannot be guilty of treason.[3] Thus, persons who have effectively renounced their American citizenship or who have become expatriated cannot be convicted of treason.[4] Further, an alien whose oath of allegiance to the United States is void, because taken in accordance with the provisions of a statute which had ceased to exist, cannot be guilty of treason against the United States.[5] However, one whose citizenship is voidable rather than void can be convicted of treason.[6]

Footnotes

1 U.S. v. Tomoya Kawakita, 96 F. Supp. 824 (S.D. Cal. 1950), judgment aff'd, 190 F.2d 506 (9th Cir. 1951), judgment aff'd, 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).
As to apprehension and detention of aliens, generally, see Am. Jur. 2d, Aliens and Citizens[Westlaw®(r): Search Query].

2 Carlisle v. U.S., 83 U.S. 147, 21 L. Ed. 426, 1872 WL 15321 (1872).

Those aliens who, being domiciled in the country prior to the Civil War, gave aid and comfort to the Confederate cause were subject to be prosecuted for violation of the laws of the United States against treason and for giving aid and comfort to the enemy. Radich v. Hutchins, 95 U.S. 210, 24 L. Ed. 409, 1877 WL 18579 (1877); Carlisle v. U.S., 83 U.S. 147, 21 L. Ed. 426, 1872 WL 15321 (1872).

3 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952) (by implication).

4 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952) (by implication).

The federal treason statute is not applicable to a former American citizen who has become a naturalized citizen of Japan. Iva Ikuko Toguri D'Aquino v. U. S., 192 F.2d 338 (9th Cir. 1951).

5 U S v. Villato, 2 U.S. 370, 2 Dall. 370, 28 F. Cas. 377, No. 16622, 1 L. Ed. 419 (C.C.D. Pa. 1797).

6 U.S. v. Stephan, 50 F. Supp. 445 (E.D. Mich. 1943), decision aff'd, 139 F.2d 1022 (C.C.A. 6th Cir. 1943).

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§ 70. Accessories

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West's Key Number Digest

West's Key Number Digest, Treason 10

Treason differs from other crimes in that there can be no accessories to the crime.[1] All persons participating in or contributing to the commission of treasonable acts are regarded as principals and punishable as such although their acts may be such as would, in connection with other felonies, make them only accessories before the fact or aiders and abettors.[2] Where war is levied, or where persons assemble to subvert government by force, all who play a part, however minute or however remote from the place of action, and who are leagued in the general conspiracy, are guilty of treason.[3]

Footnotes

1 Ex parte Bollman, 8 U.S. 75, 2 L. Ed. 554, 1807 WL 1261 (1807).

2 Ex parte Bollman, 8 U.S. 75, 2 L. Ed. 554, 1807 WL 1261 (1807); Kaufman v. U.S., 212 F. 613 (C.C.A. 2d Cir. 1914).
As to accessories, generally, see Am. Jur. 2d, Criminal Law[Westlaw®(r): Search Query].

3 Ex parte Bollman, 8 U.S. 75, 2 L. Ed. 554, 1807 WL 1261 (1807); Druecker v. Salomon, 21 Wis. 621, 1867 WL 1729 (1867).

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4. Proof and Defenses

§ 71. Proof, generally

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West's Key Number Digest

West's Key Number Digest, Treason 9, 13

A.L.R. Library

Accused's right to, and prosecution's privilege against, disclosure of identity of informer, 76 A.L.R.2d 262

To sustain a conviction for treason, the prosecution has the burden of showing a treasonable enterprise and that the defendant was a party to it[1] sufficient to satisfy the jury beyond a reasonable doubt that the defendant is guilty.[2] The constitutional requirement that treason be proved by the testimony of two witnesses does not make inadmissible or nonpersuasive all other evidence.[3] It is a requirement of minimum proof, not intended to deprive the trial court of the aid of other testimony.[4]

If overt acts of treason have been established by the testimony of two witnesses as required by the Constitution,[5] corroborative or cumulative evidence of any admissible character may be introduced either to strengthen the government's direct case or to rebut testimony or inferences offered on behalf of the defendant.[6] The constitutional provision does not operate to exclude confessions or admissions made out of court where a legal basis for the conviction has been laid by the testimony of two witnesses of which such confessions or admissions are merely corroborative.[7]

Intent to betray as an element of treason must be inferred from conduct, and it may be inferred from the overt acts themselves, from the defendant's own statements of his or her attitudes toward the war effort, and from the defendant's own professions of

loyalty to the enemy.[8] Conversations and occurrences long before an indictment for treason in aiding and sheltering an enemy spy and saboteur are admissible on the question of intent and adherence to the enemy.[9] Sample recordings made for the enemy during time of war are admissible against a defendant on trial for treason to show intent although the recordings do not constitute proof of an overt act.[10] A copy of a letter which was generally circulated to stir up insurrection may be admitted in evidence in a trial for treason by engaging in insurrection.[11]

Practice Tip:

Under Title III of the Omnibus Crime Control and Safe Streets Act,[12] the government may seek to obtain authorization and approval for wire interception and interception of oral communications—a wiretap—to provide evidence of the commission of the offense of treason.[13]

Footnotes

1 U.S. v. Haupt, 152 F.2d 771 (C.C.A. 7th Cir. 1945), judgment aff'd, 330 U.S. 631, 67 S. Ct. 874, 91 L. Ed. 1145 (1947).

2 U.S. v. Fricke, 259 F. 673 (S.D. N.Y. 1919).

3 Cramer v. U.S., 325 U.S. 1, 65 S. Ct. 918, 89 L. Ed. 1441 (1945).
As to the two witness rules, see § 78.

4 Cramer v. U.S., 325 U.S. 1, 65 S. Ct. 918, 89 L. Ed. 1441 (1945).

5 As to the overt acts requirement, see § 65.

6 Cramer v. U.S., 325 U.S. 1, 65 S. Ct. 918, 89 L. Ed. 1441 (1945).

7 Haupt v. U.S., 330 U.S. 631, 67 S. Ct. 874, 91 L. Ed. 1145 (1947); Cramer v. U.S., 325 U.S. 1, 65 S. Ct. 918, 89 L. Ed. 1441 (1945).

8 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).

9 Haupt v. U.S., 330 U.S. 631, 67 S. Ct. 874, 91 L. Ed. 1145 (1947).

10 Chandler v. U.S., 171 F.2d 921 (1st Cir. 1948).

11 U S v. Mitchell, 2 U.S. 348, 2 Dall. 348, 26 F. Cas. 1277, No. 15788, 1 L. Ed. 410 (C.C.D. Pa. 1795).

12 18 U.S.C.A. §§ 2510 to 2522.

13 Federal Procedure, L. Ed. §§ 22:259, 22:260.

70 Am. Jur. 2d Sedition, Etc. § 72

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§ 72. Two-witness rule

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treason 9, 13

A.L.R. Library

Accused's right to, and prosecution's privilege against, disclosure of identity of informer, 76 A.L.R.2d 262

The United States Constitution provides that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court.[1] This provision must be given a reasonable effect in the light of its purpose both to preserve the offense and to protect citizens from its abuse.[2]

Observation:

The Supreme Court has identified but not resolved the question whether the Treason Clause applies to offenses that include all the elements of treason but are not branded as such.[3] The Court has stated in dicta that Congress cannot dispense with the two-witness rule merely by giving treason another name.[4] However, the question whether a defendant who engaged in subversive conduct might

be tried for a crime involving all the elements of treason, but under a different name and without the constitutional protection of the Treason Clause, remains open.[5]

The constitutional provision is in effect a requirement that the overt act be established by direct evidence, so as to preclude a conviction on circumstantial evidence only.[6] It is not satisfied by testimony as to some separate act from which it can be inferred that the charged act took place.[7] Thus, it is necessary to produce two direct witnesses to the whole overt act.[8] However, the testimony of the two witnesses to the same overt act need not be identical if the same incident is described.[9] It has been said that while it may be possible to piece together bits of the overt act, if so, such act must have the support of two oaths.[10]

The two-witness requirement applies only to proof of the act itself, not to proof of the intention with which it was done.[11] Nor does the two-witness rule apply to the element of adhering to the enemy.[12] However, to sustain a finding that the accused actually gave aid and comfort to the enemy, each overt act relied on to sustain the conviction must be established by the testimony of two witnesses.[13]

A confession proved by two witnesses is not sufficient to prove treason but is good by way of corroboration although of another species of treason.[14]

Footnotes

1 U.S. Const. Art. III, § 3, cl. 1.

2 Cramer v. U.S., 325 U.S. 1, 65 S. Ct. 918, 89 L. Ed. 1441 (1945).

3 U.S. v. Rahman, 189 F.3d 88, 52 Fed. R. Evid. Serv. 425 (2d Cir. 1999).

4 Cramer v. U.S., 325 U.S. 1, 65 S. Ct. 918, 89 L. Ed. 1441 (1945); U.S. v. Drummond, 354 F.2d 132 (2d Cir. 1965).

5 U.S. v. Rahman, 189 F.3d 88, 52 Fed. R. Evid. Serv. 425 (2d Cir. 1999).

6 Cramer v. U.S., 325 U.S. 1, 65 S. Ct. 918, 89 L. Ed. 1441 (1945).
As to the overt acts requirement, see § 65.

7 Haupt v. U.S., 330 U.S. 631, 67 S. Ct. 874, 91 L. Ed. 1145 (1947).

8 U.S. v. Robinson, 259 F. 685 (S.D. N.Y. 1919).

9 Haupt v. U.S., 330 U.S. 631, 67 S. Ct. 874, 91 L. Ed. 1145 (1947).
An overt act of treason has been held sufficiently proved by two witnesses testifying to the same act even though their testimony is not identical and there is a variance as to details. Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).

10 U.S. v. Robinson, 259 F. 685 (S.D. N.Y. 1919).

11 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952); Cramer v. U.S., 325 U.S. 1, 65 S. Ct. 918, 89 L. Ed. 1441 (1945).
The criminal intent necessary for conviction of the crime of treason need not be proved by two witnesses; it may be proved by one or more witnesses, or by circumstances, or by a single fact. Stephan v. U.S., 133 F.2d 87 (C.C.A. 6th Cir. 1943).

12 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).

13 Cramer v. U.S., 325 U.S. 1, 65 S. Ct. 918, 89 L. Ed. 1441 (1945).

14 Respublica v. Roberts, 1 U.S. 39, 1 Dall. 39, 1 L. Ed. 27, 1778 WL 53 (Pa. Ct. of Oyer & Terminer 1778).

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§ 73. Defenses

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West's Key Number Digest

West's Key Number Digest, Treason 9

A.L.R. Library

Coercion, compulsion, or duress as defense to criminal prosecution, 40 A.L.R.2d 908

A person accused of treason may defend on the ground that force or coercion compelled his or her conduct,[1] but in order to excuse a treasonous act on the ground of coercion, compulsion, or necessity, one must have acted under apprehension of immediate and impending death or of serious and immediate bodily harm.[2] Fear of injury to one's property or remote bodily harm does not excuse such an offense.[3]

Footnotes

1 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).

2 Iva Ikuko Toguri D'Aquino v. U. S., 192 F.2d 338 (9th Cir. 1951).

3 Iva Ikuko Toguri D'Aquino v. U. S., 192 F.2d 338 (9th Cir. 1951).
Where the accused was charged with treason in having participated in propaganda broadcasts for Germany during World War II, the fact that other persons doing similar work had been threatened was insufficient

to constitute such coercion as would excuse the defendant's treasonable conduct. Gillars v. U.S., 182 F.2d 962 (D.C. Cir. 1950).

The apprehension of any loss of property by waste or fire, or even of slight or remote injury to the person, is no excuse for treasonable acts in joining an insurrection. U.S. v. Vigol, 2 U.S. 346, 2 Dall. 346, 28 F. Cas. 376, No. 16621, 1 L. Ed. 409 (C.C.D. Pa. 1795).

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§ 74. Jurisdiction; extradition

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treason 11 to 14

The United States courts have jurisdiction to try cases involving the offense of treason against the United States, even where the offense is committed outside the United States and in a foreign country.[1] For example, the United States court had jurisdiction to try an American citizen for the crime of treason, despite the fact that the defendant was brought into this country after being arrested by troops occupying Germany.[2] The Posse Comitatus Act, which generally prohibits the military from making an arrest in conjunction with a prosecution by civil authorities,[3] did not bar the court's exercise of jurisdiction because the Army was the sole law enforcement agency in Germany at the time of the arrest.[4]

Observation:

The federal courts' jurisdiction to try treason cases involving the conduct of persons outside the territorial jurisdiction of the United States may give rise to a question whether the accused is subject to extradition from a foreign country.[5] Generally, offenses which may be characterized as political offenses do not give rise to international extradition.[6]

Footnotes

1 Chandler v. U.S., 171 F.2d 921 (1st Cir. 1948).

2 Gillars v. U.S., 182 F.2d 962 (D.C. Cir. 1950).

3 18 U.S.C.A. § 1385.

4 Gillars v. U.S., 182 F.2d 962 (D.C. Cir. 1950).

5 Chandler v. U.S., 171 F.2d 921 (1st Cir. 1948).

6 Chandler v. U.S., 171 F.2d 921 (1st Cir. 1948).
As to extradition for political offenses, see Federal Procedure, L. Ed., Criminal Procedure[Westlaw®(r): Search Query].

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§ 75. Indictment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treason 12

The Constitution confers the right to indictment by a grand jury in capital or otherwise infamous cases,[1] and under the Federal Rules of Criminal Procedure, a capital offense is required to be prosecuted by indictment.[2] In addition, a federal statute specifically provides that a person charged with treason shall be furnished with a copy of the indictment at least three days before commencement of trial excluding intermediate weekends and holidays.[3]

In order to convict one of treason upon evidence of an overt act, such act must be laid in the indictment.[4] Charging different overt acts in one count does not invalidate an indictment on grounds of duplicity.[5] In an indictment for treason, it has been held that it is sufficient to allege the sending of intelligence to the enemy, without setting forth the particular letter or its contents.[6]

Footnotes

1 U.S. Const. Amend. V.
As to circumstances requiring use of indictment for infamous crime, see Am. Jur. 2d, Indictments and Informations[Westlaw®(r): Search Query].

2 Fed. R. Crim. P. 7(a)(1)(A).

3 18 U.S.C.A. § 3432.

4 Stephan v. U.S., 133 F.2d 87 (C.C.A. 6th Cir. 1943).

5 Chandler v. U.S., 171 F.2d 921 (1st Cir. 1948); Stephan v. U.S., 133 F.2d 87 (C.C.A. 6th Cir. 1943).

6 Respublica v. Carlisle, 1 U.S. 35, 1 Dall. 35, 1 L. Ed. 26, 1778 WL 50 (Pa. Ct. of Oyer & Terminer 1778).

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5. Procedure

§ 76. Assignment of counsel for accused

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treason 11, 14

A federal statute provides that persons indicted for treason, as a capital offense, are allowed to make full defense, and the court before which the defendant is to be tried, or a judge thereof, must promptly, upon the defendant's request, assign two such counsel, of whom at least one must be learned in the law applicable to capital cases.[1] Assigned counsel should have free access to the defendant at all reasonable hours.[2]

Footnotes

1 18 U.S.C.A. § 3005.

2 18 U.S.C.A. § 3005.

70 Am. Jur. 2d Sedition, Etc. § 77

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§ 77. Trial

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treason 14

A federal statute requires that a person charged with treason must be furnished, at least three days before commencement of the trial, excluding intermediate weekends and holidays, with a list of the veniremen and with a list of witnesses to be produced on the trial, such lists to include the addresses of the witnesses.[1] However, the list of veniremen and witnesses need not be furnished if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person.[2]

The fact that government employees sat on a jury to try a treason case does not render the trial a partial one.[3] Nor is failure to sequester the jury during a treason trial necessarily prejudicial error.[4]

Practice Tip:

An accused indicted for treason, a capital offense, has a statutory right to compulsory process of the court to compel his or her witnesses to appear at trial to the same extent as usually granted to the prosecution to compel its witnesses to appear at trial.[5] Further, the Sixth Amendment to the United States Constitution guarantees an accused in all federal criminal prosecutions the right to have compulsory process for obtaining witnesses in his or her favor.[6]

Footnotes

1 18 U.S.C.A. § 3432.

2 18 U.S.C.A. § 3432.

3 Burgman v. U.S., 188 F.2d 637 (D.C. Cir. 1951).

4 Stephan v. U.S., 133 F.2d 87 (C.C.A. 6th Cir. 1943).

5 18 U.S.C.A. § 3005.

6 U.S. Const. Amend. VI.

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§ 78. Trial—Questions of law or fact

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West's Key Number Digest

West's Key Number Digest, Treason 14

Whether a defendant tried for treason acted with intent to betray is a question for the jury.[1] Intent cannot be judged by the court in passing on the legal sufficiency of proof of the overt act.[2]

Footnotes

1 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).

2 U.S. v. Cramer, 137 F.2d 888 (C.C.A. 2d Cir. 1943), judgment rev'd on other grounds, 325 U.S. 1, 65 S. Ct. 918, 89 L. Ed. 1441 (1945).

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5. Procedure

§ 79. Review or pardon

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Treason 9, 14

A reviewing court is not warranted in interfering with a death sentence imposed upon a conviction for treason, when the defendant committed flagrant and persistent acts of treason.[1]

A conviction of treason upon special verdicts and findings of a jury as to each of several overt acts cannot be upset by a reviewing court unless all were insufficient.[2] Where an indictment charged 10 overt acts but the conviction was based on only one of the acts charged, the appellate court would not reverse if there was sufficient evidence to support the verdict of guilty even though the court was of the opinion that the evidence was equally strong to support a conviction based on other alleged overt acts as to which the accused was acquitted.[3]

A conviction for treason cannot be sustained on the theory that, despite the insufficiency of the acts submitted to the jury, other unsubmitted acts may be resorted to as proof of the treason.[4]

The President alone is vested with the power to grant a reprieve and pardon for treason.[5]

Footnotes

1 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).

2 Tomoya Kawakita v. U. S., 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1249 (1952).

3 Gillars v. U.S., 182 F.2d 962 (D.C. Cir. 1950).

4 Cramer v. U.S., 325 U.S. 1, 65 S. Ct. 918, 89 L. Ed. 1441 (1945).

5 U.S. v. Tomoya Kawakita, 108 F. Supp. 627 (S.D. Cal. 1952).

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A. Sedition and Subversive Activities

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Research References

West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 1, 2

A.L.R. Library

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A.L.R. Index, Criminal Law
A.L.R. Index, Espionage
A.L.R. Index, Freedom of Speech and Press
A.L.R. Index, Sedition, Subversive Activities, and Treason
West's A.L.R. Digest, Insurrection and Sedition 1, 2

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A. Sedition and Subversive Activities

§ 80. Statutory provisions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 1, 2

In some states, statutes have been enacted which parallel federal legislation[1] in making it a criminal offense to obstruct or interfere with the recruiting or enlistment services of the United States, or other military, naval, or war activities or efforts of the nation,[2] and otherwise providing for the punishment of sedition and involvement in subversive activities.[3]

Observation:

The Posse Comitatus Act[4] limits the use of military personnel to enforce civilian criminal laws except for cases and circumstances expressly authorized by the Constitution or act of Congress.The Act also makes its violation a federal offense.[5] A successful defense may be raised under the Posse Comitatus Act in a state criminal prosecution, raising a violation of the Act as a grounds for the exclusion of evidence as illegally seized, but a mere incidental and technical violation of the Act has been held an insufficient basis for the suppression or exclusion of evidence obtained in violation of the Act.[6] Military agents who did not act as a posse comitatus have been held competent to testify in state criminal prosecutions.[7]

Footnotes

1 § 8.

2 Gilbert v. State of Minn., 254 U.S. 325, 41 S. Ct. 125, 65 L. Ed. 287 (1920); State v. Sinchuk, 96 Conn. 605, 115 A. 33, 20 A.L.R. 1515 (1921); State v. Holm, 139 Minn. 267, 166 N.W. 181 (1918).

3 State v. Holm, 139 Minn. 267, 166 N.W. 181 (1918).
Whether an alleged seditious publication was made with intent to bring the form of government of the United States and its flag "into contempt" within the meaning of a state sedition statute is an issue of fact as is the question whether a certain publication creates and fosters opposition to organized government within the meaning of the statute. State v. Sinchuk, 96 Conn. 605, 115 A. 33, 20 A.L.R. 1515 (1921).

4 18 U.S.C.A. § 1385.

5 18 U.S.C.A. § 1385.

6 State v. Danko, 219 Kan. 490, 548 P.2d 819 (1976) (applying 18 U.S.C.A. § 1385).

7 Lee v. State, 1973 OK CR 345, 513 P.2d 125 (Okla. Crim. App. 1973); Hubert v. State, 1972 OK CR 342, 504 P.2d 1245 (Okla. Crim. App. 1972).

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III. State Offenses

A. Sedition and Subversive Activities

§ 81. Constitutionality

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West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 1, 2

The constitutionality of state sedition and similar statutes has been considered suspect on the ground that the constitutional limitations implicit in the history of the Federal Sedition Act, namely, the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment apply not only to Congress but also to the states since, with the adoption of the Fourteenth Amendment, the First Amendment's restrictions apply also to the states.[1] A state statute which makes it a felony for a person knowingly to assist in the formation, or to participate in the management or to contribute to the support, of any subversive organization, is unconstitutionally vague where it defines "a subversive organization" as one which engages in or advocates, abets, or teaches, or a purpose of which is to engage in or advocate, abet, or teach, activities intended to overthrow the constitutional form of the state government.[2] Likewise, a statute which made it a crime to utter, sell, distribute, and the like, any book, speech, article, picture, emblem, and the like, which in any way incites, counsels, promotes, advocates, or encourages the subversion or destruction by force of the government of the United States or of that of the state has been declared unconstitutionally vague.[3] Additionally, a statute which makes it a crime to utter, sell, circulate, or distribute any publication or picture which incites, advocates, promotes, or encourages the subversion or destruction by force of the state or federal government has been declared unconstitutional on the ground that it does not require any intent or even any knowledge as to contents on the part of the person distributing the proscribed material.[4]

The constitutionality of state sedition and antisubversive statutes has also been questioned on the ground that Congress has preempted the field of sedition and subversion by enacting the Smith Act[5] and the Communist Control Act.[6] While there is authority to the effect that Congress, by such legislation, has shown its intention to occupy the field of sedition, and that consequently a state sedition statute is superseded regardless of whether it purports to supplement federal law,[7] later rulings of the United States Supreme Court and other courts are to the effect that federal legislation has preempted only the area of sedition against the national government,[8] and that the states are not stripped of the right to protect themselves and can proceed with

prosecutions for sedition against the state itself.[9] Similarly, it has been held that a state has a legitimate interest in securing from its employees information concerning subversive activities, and a state may legitimately predicate discharge of an employee on his or her refusal to give information touching on the field of security, even though the pertinent state law may have a deterrent effect on the employee's exercise of his or her federal claim of the privilege against self-incrimination.[10]

Footnotes

1 New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964). The proscription of mere advocacy of the overthrow of government would be an unconstitutional infringement upon free speech. People v. Epton, 19 N.Y.2d 496, 281 N.Y.S.2d 9, 227 N.E.2d 829 (1967).

2 Dombrowski v. Pfister, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965).

3 State v. Jahr, 114 N.J. Super. 181, 275 A.2d 461 (Law Div. 1971).

4 State v. Jahr, 114 N.J. Super. 181, 275 A.2d 461 (Law Div. 1971).

5 18 U.S.C.A. §§ 2385 et seq.
As to Smith Act, see §§ 54 to 57.

6 50 U.S.C.A. §§ 841 et seq.
As to Communist Control Act, see § 58.

7 Com. of Pa. v. Nelson, 350 U.S. 497, 76 S. Ct. 477, 100 L. Ed. 640 (1956).
The entire field of subversive activity has been preempted by federal legislation on the subject, so as to render state statutes dealing with subversive activities unenforceable, leaving the states with no power to prosecute Communist activity. State v. Jenkins, 236 La. 300, 107 So. 2d 648 (1958).

8 DeGregory v. Attorney General of State of N. H., 383 U.S. 825, 86 S. Ct. 1148, 16 L. Ed. 2d 292 (1966).

9 Uphaus v. Wyman, 360 U.S. 72, 79 S. Ct. 1040, 3 L. Ed. 2d 1090 (1959); State v. Cade, 244 La. 534, 153 So. 2d 382 (1963).
A state can validly prosecute seditious activity directed against the state or local government even though Congress has preempted the field of sedition so far as it is directed against the federal government. People v. Epton, 19 N.Y.2d 496, 281 N.Y.S.2d 9, 227 N.E.2d 829 (1967).

10 Nelson v. Los Angeles County, 362 U.S. 1, 80 S. Ct. 527, 4 L. Ed. 2d 494 (1960).

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B. Criminal Syndicalism, Sabotage, Anarchy, and Related Offenses

§ 82. Definitions

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West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 1, 2
West's Key Number Digest, War and National Emergency 1126, 1127

"Criminal anarchy" is defined as the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means.[1]

"Criminal syndicalism" has been defined as any doctrine or precept advocating, teaching, or aiding and abetting the commission of crime, sabotage, or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.[2]

Sabotage, as used in criminal syndicalism statutes, means willful and malicious physical damage or injury to physical property as a means of accomplishing industrial or political ends.[3]

Footnotes

1 Gitlow v. People of State of New York, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925); Samuels v. Mackell, 288 F. Supp. 348 (S.D. N.Y. 1968), judgment aff'd, 401 U.S. 66, 91 S. Ct. 764, 27 L. Ed. 2d 688 (1971).
A state's criminal anarchy statute proscribes advocating the overthrow of organized government by force or violence. Rosales v. State, 2012 WL 642466 (Nev. 2012).

2 Younger v. Harris, 401 U.S. 37, 91 S. Ct. 756, 27 L. Ed. 2d 669 (1971) (quoting the California statute); Burns v. U.S., 274 U.S. 328, 47 S. Ct. 650, 71 L. Ed. 1077 (1927).

3 Burns v. U.S., 274 U.S. 328, 47 S. Ct. 650, 71 L. Ed. 1077 (1927).

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§ 83. Constitutionality

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West's Key Number Digest

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A state statute prohibiting criminal syndicalism or criminal anarchy is constitutional if it is limited to penalizing an attempted overthrow of a state or local government,[1] and if its enforcement is limited to situations where advocacy of the overthrow of government by force and violence is accompanied by intent to accomplish the overthrow, and there is a clear and present danger that the advocated overthrow may be attempted or accomplished.[2] A state statute which contained a prohibition of mere advocacy of the violent overthrow of the government would be an unconstitutional infringement upon free speech[3] since the United States Supreme Court has limited the range of advocacy which can constitutionally be proscribed to that which is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[4] The mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action,[5] and a statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments.[6]

The United States Supreme Court has thus, in effect, overturned a long line of decisions[7] which had upheld the constitutionality of criminal syndicalism and criminal anarchy statutes on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the states that the states may outlaw it.[8] However, even the earlier cases upholding the validity of such statutes were limited to those which prohibited persons from organizing or aiding, abetting, or encouraging any organization which had as its sole or paramount purpose the furtherance of industrial or political change or revolution, or the overthrow of organized government, by crime, force, and violence, or other unlawful methods.[9] In any event, because a criminal anarchy statute has the potential to reach constitutionally protected speech,[10] a court will read its proscription narrowly.[11]

A state cannot validly penalize conduct or advocacy where the organization in question proposes to accomplish its goals by methods which are peaceful, nonviolent, and not otherwise unlawful.[12] The right of free speech would be violated by a statute which, by reason of the generality and comprehensiveness of its terms, failed to differentiate between peaceful and lawful methods and those of force and violence or other unlawfulness.[13]

Footnotes

1 Samuels v. Mackell, 288 F. Supp. 348 (S.D. N.Y. 1968), judgment aff'd, 401 U.S. 66, 91 S. Ct. 764, 27 L. Ed. 2d 688 (1971).
State criminal-anarchy statutes are superseded by federal legislation only insofar as they specifically punish sedition against the United States government, but states are not stripped of their means of self-defense and may continue to penalize the advocacy of subversion of the state government. State v. Cade, 244 La. 534, 153 So. 2d 382 (1963).

2 Samuels v. Mackell, 288 F. Supp. 348 (S.D. N.Y. 1968), judgment aff'd, 401 U.S. 66, 91 S. Ct. 764, 27 L. Ed. 2d 688 (1971); People v. Epton, 19 N.Y.2d 496, 281 N.Y.S.2d 9, 227 N.E.2d 829 (1967).

3 People v. Epton, 19 N.Y.2d 496, 281 N.Y.S.2d 9, 227 N.E.2d 829 (1967).
A statute which purports to punish mere advocacy and forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action falls within the purview of the First and Fourteenth Amendments. Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969).
A statute barring the employment in a state university of any person who "by word of mouth or writing willfully and deliberately advocates, advises or teaches the doctrine" of forceful overthrow of the government is unconstitutionally vague as susceptible to sweeping and improper application since it may well prohibit the employment of one who merely advocates the doctrine in the abstract without any attempt to indoctrinate others or incite others to actions in furtherance of unlawful aims. Keyishian v. Board of Regents of University of State of N. Y., 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967).

4 Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (declaring the Ohio criminal-anarchy statute unconstitutional).

5 Noto v. U.S., 367 U.S. 290, 81 S. Ct. 1517, 6 L. Ed. 2d 836 (1961).

6 Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969).

7 Whitney v. California, 274 U.S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927) (overruled in part by, Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969)); Burns v. U.S., 274 U.S. 328, 47 S. Ct. 650, 71 L. Ed. 1077 (1927); Gitlow v. People of State of New York, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925); State v. Moilen, 140 Minn. 112, 167 N.W. 345, 1 A.L.R. 331 (1918); State v. Diamond, 1921-NMSC-099, 27 N.M. 477, 202 P. 988, 20 A.L.R. 1527 (1921).

8 Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969); In re Harris, 20 Cal. App. 3d 632, 97 Cal. Rptr. 844 (2d Dist. 1971).

9 Whitney v. California, 274 U.S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927) (overruled in part by, Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969)); Gitlow v. People of State of New York, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925).

10 Rosales v. State, 2012 WL 642466 (Nev. 2012).

11 Rosales v. State, 2012 WL 642466 (Nev. 2012).

12 Gitlow v. People of State of New York, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925); State v. Diamond, 1921-NMSC-099, 27 N.M. 477, 202 P. 988, 20 A.L.R. 1527 (1921).

13 Stromberg v. People of State of Cal., 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117, 73 A.L.R. 1484 (1931); State v. Diamond, 1921-NMSC-099, 27 N.M. 477, 202 P. 988, 20 A.L.R. 1527 (1921).

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B. Criminal Syndicalism, Sabotage, Anarchy, and Related Offenses

§ 84. Constitutionality—Sabotage

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West's Key Number Digest

West's Key Number Digest, Insurrection and Sedition 1, 2
West's Key Number Digest, War and National Emergency 1126, 1127

States have enacted criminal laws penalizing sabotage.[1] Such a statute is not invalid as class legislation because it is confined in its operation to employees and employers where, in condemning other methods of terrorism to accomplish the same ends, it is general in its application.[2] The failure of a state's Sabotage Prevention Act to enumerate the reasonable grounds that would cause a saboteur to believe that his or her acts would hinder, delay, or interfere with preparation of the United States or any state for defense or for war has been held not to affect the validity of the statute or render it void for vagueness.[3]

Footnotes

1 State v. Moilen, 140 Minn. 112, 167 N.W. 345, 1 A.L.R. 331 (1918); State v. Ostensen, 150 Wis. 2d 656, 442 N.W.2d 501 (Ct. App. 1989).

2 State v. Moilen, 140 Minn. 112, 167 N.W. 345, 1 A.L.R. 331 (1918).

3 People v. Gordon, 62 Cal. App. 2d 268, 144 P.2d 662 (2d Dist. 1944).

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§ 85. Construction and application

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West's Key Number Digest

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Although a defendant's writings and graffiti encouraged the killing of public officers, where there is no evidence that the writings sought to rouse the populace to overthrow organized government by force or violence as required for criminal anarchy, the evidence is legally insufficient to sustain defendant's conviction for criminal anarchy.[1] Further, a mere abstract "doctrine" or academic discussion, having no quality of incitement to any concrete action, has been held not within the application of a statute penalizing as a criminal offense the advocacy, advising, or teaching of the overthrow of organized government by unlawful means and by immediate action leading to the accomplishment of that end.[2] However, if the constitutional requirements are met,[3] under the general definition of criminal syndicalism, it is not necessary that acts of violence be committed in order to constitute the offense.[4]

Membership in the Communist Party, with the attendant implications of dedication to sabotage, force, violence, and other illegal means of effecting political or industrial change, has been held to constitute in and of itself a violation of a criminal syndicalism act.[5] However, it has been held that before governmental action can be permitted to impose criminal sanctions based on a citizen's association with an unpopular organization, the government has the burden of establishing that the citizen has a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims.[6] A statute prohibiting sabotage, or intentional damage to property with a reasonable grounds to believe that the acts would interfere with the preparation for the defense of the United States, does not require proof of the actor's subjective intent to interfere.[7] Rather, it merely requires that a reasonable person, acting with the defendant's knowledge, has the grounds to believe it will.[8]

Footnotes

1 Rosales v. State, 2012 WL 642466 (Nev. 2012).

2 Gitlow v. People of State of New York, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925).

3 § 83.

4 People v. McClennegen, 195 Cal. 445, 234 P. 91 (1925).

5 Black v. Cutter Laboratories, 43 Cal. 2d 788, 278 P.2d 905 (1955).

6 Healy v. James, 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972).

7 State v. Ostensen, 150 Wis. 2d 656, 442 N.W.2d 501 (Ct. App. 1989).

8 State v. Ostensen, 150 Wis. 2d 656, 442 N.W.2d 501 (Ct. App. 1989).

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C. Treason

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C. Treason

§ 86. Under state constitutions and statutes

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West's Key Number Digest

West's Key Number Digest, Treason 1 to 14

State constitutions may make it a crime to commit treason against the state, but there have been very few prosecutions under such constitutional provisions or under statutes to the same effect.[1] Treason is generally considered a crime against the nation and is said to consist only, in its criminally acceptable meaning, in levying war against the United States or adhering to their enemies, giving aid and comfort to them.[2]

Under a state constitutional provision defining treason against the state in the same terms as treason against the United States, it has been said that a war being waged against the nation includes every state and that treason committed by aiding those at war against the nation is equally treason against the state.[3] On the other hand, it has been held that a treasonable act against the United States is not treason against one of the states[4] and that the offense of adhering and giving aid and comfort to the public enemies of the United States is not treason against the people of the state.[5]

Observation:

Before the adoption of the United States Constitution, the crimes of treason[6] and misprision of treason[7] were recognized as crimes which could be committed against a state.[8]

A state statute which requires that public school employees be removed for "treasonable" acts may be unconstitutionally vague if the word "treasonable" is left undefined.[9]

Footnotes

1 Cohen v. Wright, 22 Cal. 293, 1863 WL 569 (1863).

2 Bennett v. Seimiller, 175 Kan. 764, 267 P.2d 926 (1954).
As to treason as a crime under the United States Constitution, see §§ 59 to 79.

3 Cohen v. Wright, 22 Cal. 293, 1863 WL 569 (1863).

4 Ex parte Quarrier, 2 W. Va. 569, 1866 WL 3861 (1866).

5 People v. Lynch, 11 Johns. 549, 1814 WL 1458 (N.Y. 1814) (consequently, an indictment charging the offense to have been committed against the people of that state will be quashed).

6 Cooper v. Telfair, 4 U.S. 14, 4 Dall. 14, 1 L. Ed. 721, 1800 WL 3186 (1800); Respublica v. Carlisle, 1 U.S. 35, 1 Dall. 35, 1 L. Ed. 26, 1778 WL 50 (Pa. Ct. of Oyer & Terminer 1778).

7 Respublica v. Weidle, 2 U.S. 88, 2 Dall. 88, 1 L. Ed. 301, 1781 WL 43 (Pa. 1781).
As to misprision of treason generally, see § 61.

8 Respublica v. Chapman, 1 U.S. 53, 1 Dall. 53, 1 L. Ed. 33, 1781 WL 41 (Pa. 1781).

9 Keyishian v. Board of Regents of University of State of N. Y., 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967).

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